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ORGANISED CRIME TRENDS IN AFRICA

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Demystifying the advance-fee fraud criminal network
Okolo Ben Simon

The emergence of advance-fee fraud in its present manifestation as an international phenomenon has puzzled security analysts and experts, especially with regard to its apparently organised nature. While there are various manifestations of the crime, the infamous variant is often associated with section 419 of the Nigerian Criminal Code. This article argues that the organised nature of the crime is incidental to the activities carried out by scammers and so should not attract the same level of attention as other organised criminal groups. The article concludes that although states should be responsible for the prevention and punishment of the perpetrators within their boundaries, there should
be a coordination of efforts between the different states’ security apparatuses because of the loose arrangements between some of the criminal elements and the cross-boundary nature of the crime.

The public sector corruption and organised crime nexus: The case of the fertiliser subsidy programme in Malawi
Richard I C Tambulasi

The nexus between corruption and organised crime is under-established. This article argues, however, that there is a direct linkage between corruption and organised crime. By using the case study of a Malawi fertiliser subsidy programme the article shows that corruption not only gives rise to organised criminal groups, but also works as a lubricant for the effective operation and survival of organised criminal groups. The fertiliser subsidy programme implemented by Malawi in the 2005–2009 growing seasons has generally been heralded as a success as a result of the resultant abundant yields. Donor organisations that were initially not in support of the programme as it was in conflict with their neoliberal policy ideals subsequently began funding it. However, the programme was rocked by corruption which has given rise to organised criminal groups who have hijacked the whole process and either smuggled the subsidised fertiliser to other countries or took it for their personal use. The problem has been exacerbated by the international dimensions of the crime and the fact that traditional leaders, politicians and government officials have been key players in the process, thereby intensifying the corruption/organised crime nexus. This in turn has had a negative effect on the poor who were supposed to be the primary beneficiaries of the programme.

Prosecution politics: Recalibrating the role of prosecution within the anti-corruption agency agenda
S Chartey Quarcoo

Many African nations have promulgated anti-corruption agencies charged in part with prosecuting corrupt officials. Yet prosecution has spelled both peril and promise for these young institutions. This article contends that nations that place an imbalanced emphasis on the prosecutorial functions of their anti-corruption bodies risk undermining their efficacy. Comparing two such bodies – Nigeria’s Economic and Financial Crimes Commission (EFCC) and South Africa’s Directorate of Special Operations (DSO) – it argues that governments must elevate the profile of their non-prosecutorial preventive measures to offset the inevitable vulnerabilities that accompany prosecution. This article further argues that in the absence of an increased commitment to preventive measures, prosecution-focused strategies may place an undue burden on the most precarious component of a country’s anti-corruption campaign. It compares the legislative frameworks and challenges of the EFCC and DSO, and proposes a recalibration of
the role of prosecution within the panoply of mechanisms countries have designed to combat corruption.

**Tusks and trinkets:**
An overview of illicit ivory trafficking in Africa

Anita Gossmann

Massive ivory poaching in Africa during the 1970s and 1980s prompted a global ban on the ivory trade in 1989. Twenty years on from the ban, elephants are once again being poached at alarming rates for their tusks. This rise in poaching has coincided with a greater level of organisation and sophistication in the illegal trade in ivory and is associated with a growing demand for ivory in Asia, especially China. Beyond mere criminal enterprise, however, this mushrooming illegal trade is also aiding in funding conflict and instability on the continent. This article aims to broadly outline the most salient dimensions of the illegal ivory trade in Africa, from poaching for profit to that used to fund conflict, those involved, their methods and means.

**Africa Watch**

**Madagascar’s political crisis:**
What options for the mediation process?

David Zounmenou

The SADC-led mediation in Madagascar has once again come to a standstill. Personal antagonisms have brought to a halt a process that has gone as far as defining and reaching an agreement on the framework of a transition, one that could pave the way for the country’s return to democratic order. As concerns are raised over the future of the political dialogue and the likelihood of political violence, it is critical that the mediation refocus to serve as an opportunity for reforms aimed at restoring political legitimacy. The way the Southern African Development Community approaches the situation on the island will enhance or undermine its credibility in addressing similar political crises in other parts of the region.

**Gabon:**
Continuity in transition

Nadia Ahmadou

Following recent and rather dramatic political changes in the Republic of Gabon, all attention focused on this small oil-producing country in West Africa, with the expectation that violence would erupt, as happened in other countries of the region. Surprisingly, the political changes have not resulted in more than minor tensions. This
piece broadly addresses the changes and maps out the possible future of the country in the short term.

**Essays**

**Mass Atrocity Response Operations: An annotated planning framework**

Michael C Pryce

The Mass Atrocity Response Operations (MARO) Project, a collaboration of Harvard University and the United States Army, focuses traditional military planning on the mission of genocide prevention. This article describes a generic planning framework designed for use by governments, regional peacekeeping organisations and non-govermental organisations to coordinate prevention and intervention efforts. To be effective, preventative diplomacy depends on the demonstrated capability and will to intervene if necessary. The MARO Project’s annotated planning framework and scenarios illustrate the entire planning process, from mission analysis through to selection of a course of action, as modified specifically for mass atrocity interventions. Emphasis is placed on fostering a broad-spectrum response through interagency cooperation by responding governments as well as international coalition building. The MARO planning framework facilitates this cooperation by providing a common vocabulary and procedures for evaluating an emerging crisis and identifying potential responses. This overview of the complex military planning process gives the civilian planner insight and introduces the anti-genocide community to a practical tool for turning rhetoric into considered action.

**The impact of clawback clauses on human and peoples’ rights in Africa**

Sandhiya Singh

The African Court on Human and Peoples’ Rights and the birth of the African Union are important developments in the history of Africa. For the first time there will be a continental judicial mechanism for the adjudication of human rights issues. However, the African human rights system has been dogged by political bias that has marred the development of a credible human rights regime on the continent. The difficulty may therefore lie in the manner in which the proposed court applies its discretion in relation to the doctrine of the margin of appreciation. As a subsidiary body that has a power of review over state action, the proposed court must tread warily when applying these principles. Lessons may be learnt from the well-established European Court of Human Rights, which has applied and developed the doctrine of margin of appreciation. Applying this knowledge in an African context is important, but it must take the particular circumstances of Africa into account.
Commentaries

Understanding the West African cyber crime process
Andrews Atta-Asamoah

Unsolicited mail from West Africa originated largely in Nigeria and is therefore often called the ‘Nigerian letter’. In recent times this phenomenon has assumed remarkable criminal dimensions and has a detrimental effect on the socio-economic development of the entire region. This type of cyber crime has evolved from the mailing of unsolicited letters to more sophisticated Internet-based criminal activity supported by document falsification, identity theft and money laundering. The realisation of the damaging effects of the crime has sparked debate in many theatres of national security, commerce and development in the region. In response, some countries in West Africa have started to implement initiatives aimed at curbing cyber crime. However, there is limited knowledge of the scamming process and the modus operandi of the scammers and therefore the phenomenon still flourishes and the number of reported victims across the world continues to rise. This article analyses the lifecycle of a typical West African cyber crime process to enhance an understanding of the modus operandi of the perpetrators. The conclusion reached is that despite the increasing sophistication of the crime, education of the masses, use of web-based snare programmes and international collaboration could help curb the phenomenon.

Human securitised reintegration of formerly abducted children in Northern Uganda
Grace Maina

At the end of every civil conflict the international community, through its agencies and other non-state actors, always provide aid to war-torn countries for reconstructing their communities. This in many cases involves rebuilding infrastructure and restoring the affected communities, which usually include disarmament, demobilisation and reintegration programmes. The objective of these programmes is to enable the returning ex-combatants to transform their lives from violence to a peaceful and civil community way of life. It has been the premise that if this transformation were to occur, then societies would become peaceful. There has been growing support for these programmes but there has been very little analysis of whether they are useful and effective in promoting peace. There has been minimal analysis on what successful programmes would entail for local populations and what the effect of that success would be. Though well intentioned, there is much work to be done to assess the utility and efficacy of reintegration initiatives in achieving the objective of ensuring that formerly abducted children attain a civilian lifestyle that is reasonably free from fear and want.
Editorial: Organised criminal business on the rise in Africa

Annette Hübschle

The overarching theme of African Security Review 18(4) relates to patterns and trends of organised crime on the African continent. The topic was inspired by the growing interest of African law enforcement agents, government officials and researchers in this criminal phenomenon. Moreover, the Organised Crime and Money Laundering Programme of the Institute for Security Studies is collaborating with SARPOCCO (the Southern African Police Chiefs Cooperating Organisation) on a three-year research project aimed at enhancing responses of law enforcement agencies to organised crime in Southern Africa.

A few reports on the growth of ‘organised crime’ have surfaced over the past decade. For example, a 2005 United Nations report on Crime and development in Africa concluded that ‘Africa may have become the continent most targeted by organized crime’.1 Among others, it stated: ‘International drug seizures indicate that Africa is increasingly being used to route drugs destined for other markets …’.2 Southern African governments go further and warn about the corroding impact that organised crime has on governance,
business and development. In the SADC Protocol on Combating Illicit Drugs, Southern African heads of state endorsed the following:

... the region is being increasingly used as a conduit for illicit drugs destined for international markets ... illicit drug trafficking generates large financial gains and wealth enabling trans-national criminals and organizations to penetrate, contaminate and corrupt the structures of governments, legitimate commercial and financial business and society at all levels.3

Organised crime, of course, does not revolve around drugs only. The expansion of the criminal market in Southern Africa has also been driven by increases in armed robbery, the smuggling of commodities such as firearms, counterfeit goods, endangered species, diamonds and other precious stones, and the smuggling of stolen motor vehicles. Contemporary forms of organised white-collar crime combine fraud, corruption and money laundering in interconnected webs of deceit. Secretive political systems inherited from colonial public administration and poor corporate governance in the private sector facilitate economic crime across the region. Sometimes the complexity of the schemes by which such crime is committed makes it difficult to detect the fraud, corruption or money-laundering features. Even the smuggling and sometimes the trafficking of human beings has become part of the activities of some of the criminal groups and networks in the region.

While political leaders in Southern Africa are yet to agree on the modalities of closer economic integration among SADC countries, organised criminal groups appear to have long succeeded in creating a ‘free-trade zone’ for illicit commerce in the sub-region. It is widely accepted that organised crime has expanded significantly, even though the actual extent and impact of organised crime in the sub-region and across Africa as a whole has not been documented.

Organised crime is a relatively new phenomenon to law enforcement in Southern Africa. The poor information available on organised crime in most of the sub-region undermines the ability of law enforcement agencies to effectively identify and combat it, both at the national and sub-regional levels. SARPCCO officials are keenly aware that law enforcement agencies will not be able to implement the UN Convention Against Transnational Organised Crime if they do not have adequate, up-to-date information on organised crime. Against this background, the SARPCCO Secretariat and the ISS explored how to collaborate to facilitate a better understanding of organised crime in Southern African countries. A joint project called ‘Enhancing regional responses against organised crime’, the EROC project, was the result.

This project envisages a rigorous process of profiling organised crime which has not been systematically performed anywhere in the sub-region. It is a strategic process that
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is more likely to produce effective measures rather than sporadic initiatives against organised crime. The project seeks to provide information on the major organised criminal activities identified, on the identity, structure and modus operandi of organised crime groups and networks, and on law enforcement measures against it in SARPCCO member states. Using that information, the project will assess the extent of the organised crime threat to the sub-region.

While this issue of *African Security Review* is dedicated to general trends and patterns of organised crime across the whole continent, a lacuna exists regarding research reports and articles emanating from the continent. It is hoped that the articles and features contained herein will inspire African academics and researchers to engage with this emerging human security concern.

**Notes**

2 Ibid, 31.
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Demystifying the advance-fee fraud criminal network

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Introduction

Nigeria, a West African state, is famous for its oil wealth. However, this oil wealth has contributed to the country’s infamous and notorious reputation, with anecdotal evidence suggesting that as a result of oil wealth mismanagement, corruption became entrenched in the Nigerian psyche. Consequently the Nigerian state has abdicated its duties, leaving its people to fend for themselves. Such abdication of state functions could have been one of the factors that gave rise to individual criminality in Nigeria. As a result of the collusion of the political elite with foreign companies and individuals to divert the nation’s oil wealth to foreign banks, the genre of crime infamously named ‘419’ developed and has become widespread.

Keywords Nigeria, advance-fee fraud, organised crime
This type of crime originally existed on the local and domestic scene and was known as ‘obtaining by tricks’. It later became internationalised because the perpetrators targeted foreigners, and is generally known as ‘advance-fee fraud’ (AFF). The ‘419’ designation refers to a section of the Nigerian Criminal Code that criminalises the act of obtaining something under false pretences.¹

While different studies have suggested that the AFF perpetrated by Nigerians constitutes an organised crime network,² empirical evidence seems to suggest otherwise. What does seem to exist are a number of loose criminal networks that come together when the need arises to execute a particular ‘job’. This article attempts to interrogate the organised nature (or lack thereof) of such criminal networks and to propose ways in which the international community could tackle this crime that has forced its presence onto the international crime scene.

Tracing the origin of advance-fee fraud

AFF in its present form is generally associated with Nigeria, particularly from the late 1970s. However, this does not mean that AFF is indigenous to Nigeria, as this genre of crime has been in existence since the 16th century.³ In what was originally known as the ‘Spanish prisoner scheme’, wealthy merchants were contacted by scammers to assist in smuggling the child of an imprisoned family member out of Spain. Later, for instance, in the 1840s, in Sydney, Australia, a Mr Monies was tricked by one Mick Bell in Sydney, Australia, into providing him with funds to finance the smuggling of £20 000 worth of goods out of the country. On discovering that the scheme was fraudulent, Mr Monies reported the matter to the police, after which Mr Bell was arrested, prosecuted and sentenced to two months’ imprisonment.⁴

The current manifestation of the crime has its roots in Nigeria in the late 1970s and early 1980s as a locally based crime. While the oil revenue of the 1960s and 1970s led to the influx of petro-dollars into the country, it also created a massive opportunity for the country’s elite to loot the economy. In most cases, they acted in collusion with foreign businesses. This would later come to haunt the international community, as anecdotal evidence supports the view that the first set of Nigerians that sent out what is today known as AFF letters were mainly dismissed civil servants who worked either at the Central Bank of Nigeria or the Nigerian National Petroleum Corporation.⁵ Evidence suggests that because they were privy to situations where their bosses in the past had siphoned off Nigeria’s wealth with the assistance of foreigners, they used the same scheme, albeit with the intention of defrauding their ‘business partners’. They reasoned that since such people were aware that Nigeria’s wealth was being siphoned off, they would jump at the opportunity to make more money, and they were right.⁶ Most of their initial contacts were fruitful. In fact, there is a popular anecdote amongst AFF scammers
that in the early days of Nigerian AFF, when they send out ten letters ‘requesting assistance’ for transferring funds abroad, they would receive 12 responses signifying interest. However, with the decline in world oil prices in the 1980s and the practices of corrupt Nigerian elite, the populace faced hard times and in order to cushion the effect, some resorted to fraudulent schemes.

The end of Nigeria’s civil war was possibly another factor that gave rise to the crime. It is argued that as a result of the hardship experienced by Nigerians during the war in which about 3,1 million Igbo died, they resorted to a non-violent way of survival. Still others have pointed to what they regard as the innate nature of man to take advantage of others in any business dealings. The citizens’ use of violence and deception for economic gain has also been linked to the weakening of the state. The devaluation of the naira, the local currency, in the 1980s could be regarded as one of the factors that led to internationalisation of the crime. Before the devaluation the naira was stronger than the US dollar and most fraudsters were content with making money locally, but devaluation had the added benefit that a few dollars could be exchanged for a large number of naira.

The earliest Nigerian form of the crime was ‘contact non-violent crime’ where the perpetrator meets with the potential victim and tells him or her either a hard-luck story that will elicit sympathy, or a story setting out a business opportunity. Once the potential victim shows interest in either assisting the person, or investing in the said ‘business’, the scammer reverts to his original plan – to obtain money under false pretences. This is done through tricks, the most popular being the ‘doubling’ or ‘washing’ of money.

In the ‘doubling’ of money, the scammer convinces the victim that naira notes of whatever denomination can be doubled by an act of ‘magic’. He demonstrates the ‘authenticity’ of the scheme by encouraging the victim to give the scammer the smallest denomination he has. Through the chanting of ‘incantations’ the money presented gets ‘doubled’. For instance, where a potential victim presents 100 naira, the scammer ‘doubles’ it to 200 naira. In order to convince the victim of the authenticity of the doubled currency, he is given the 200 naira to spend.

Convinced that the doubling is genuine, the victim wants the scammer to ‘double’ more money. In most cases the ‘reluctant’ scammer only agrees after some persuasion by the victim. If the victim is unable to obtain cash, he is encouraged to bring valuable goods, especially jewellery. On the appointed day and time the victim is taken to an out of the way location, generally a stream and river that is associated with a local god or is used by one of the prayer churches along the shoreline. The victim is instructed to place the cash and other items on an altar-like podium. The scammer in a show of ritualistic reverence puts the items and cash in a box and while chanting his incantation, switches the box with an identical one which was hidden from view. He hands the false box to the victim with strict instructions on when and how to open the box (such as after three days of
fasting or at the stroke of midnight). The scammers might also instruct the victim not to speak to anyone for the certain number of days or to abstain from all forms of sexual activity before opening the box. When the box is eventually opened it is of course filled with paper or stones. The ritualistic actions associated with this trick have led many to think that it has an occult nature, but this notion was dismissed by one of the scammers interviewed as ‘merely a psychological gimmick’.10

In the ‘washing’ of money, the scammer convinces the victim that he has a box-load of currency defaced by black ink. He then demonstrates ‘washing’ a small amount to the victim, only to discover that the cleaning ‘chemical’ is either finished or has congealed in the container. The victim is encouraged to spend the money and the scammers extract an oath of secrecy from the victim not to reveal the transaction. They then ask the victim for money to buy more chemicals, and in order to further secure the victim’s trust, he is given the box-load of ‘currency’ to keep until they are able to buy more chemicals to wash the rest of the currency. After the scammers disappear with his cash, the victim eventually opens the box, which will again be full of old newspapers or other paper cut to note size. In reality, of course, the only real currency that was ever in the box was that used to lure the victim. It is unlikely that the victim will be able to locate or trace the perpetrators, as they would have moved to another location. Even if the victim is able to trace the scammers and does report the scam to the police, the police are more often than not unable to prosecute them, either as a result of lack of evidence or because of police connivance with the scammers.

It is this brand of ‘wash wash’ that was transformed into the international form of the crime where potential victims are presented with a ‘trunk load of currency’ waiting to be transferred to the victim’s foreign account.

In the letter-writing form of the crime, the target shifted from the local Nigerian community to international fora. Initially, most of the letters were purported to have originated from the Central Bank of Nigeria, Nigerian National Petroleum Corporation, Ministry of Finance, and other such official-sounding places. Most of the letters had one thing in common – the over-invoicing of government contracts – and the potential victim was invited to present himself as a legitimate foreign contractor who had completed a contract for the Nigerian government and is now seeking payment.

It is important to note that the early scammers actually used state or quasi-state facilities to execute their scams. For instance, some victims arriving in Nigeria to ‘sign off’ their ‘payments’ were escorted from the airport by armed ‘government’ security operatives to meetings at the Central Bank of Nigeria where official-looking papers were presented for signature. It must be pointed out, however, that it is possible that such offices designated as the Central Bank of Nigeria were never the real offices of the nation’s apex bank, but makeshift arrangements presented as the bank.
The above is not the only variant of advance-fee fraud. There are other variants of fraud that seek to prey on the greed of people or their gullibility. These include Internet auction fraud, dubious lotteries, and clairvoyant scams that are offered daily via the Internet.11 Yet others include Feymen confidence tricksters (mainly from Cameroon although the system is spreading to other African and non-African states, including Saudi Arabia, Yemen and Indonesia) and Bindo tricksters (derived from the name of the ‘conjuror’ Bindo Bolembe whose scheme was in vogue in the Democratic Republic of Congo in the early 1990s).12 Because of the global nature and the media hype surrounding 419 letters, any fraudulent venture has been tagged ‘419’ in Nigeria and elsewhere.

While the initial wording of such scam letters were premised on business deals, later variations were based on situations resulting from conflicts. A third variation of such letters purported to emanate from banks and was premised on the greed and callousness of potential victims, since they are normally recruited to play a part in defrauding the ‘estate of a deceased’. For instance, a letter received by this author when he was researching the article purported to originate from the African Development Bank in Burkina Faso. It stated that the sum of US$17,5 million was lying in an unclaimed account of the bank and all efforts to trace the relatives of the deceased owner had proved futile. The author was invited to present himself as a relative of the deceased to claim the funds. The illicit nature of the acquisition acts as bait to entice the potential victim.13

The early letters, which were based on an inflated contract sum waiting to be claimed from the government treasury, reflected the corrupt nature of the Nigerian state. However, with post-Cold War conflicts springing up in Africa, the scammers – who seem to be very knowledgeable about world affairs – switched their story from mainly Nigerian situations to African conflict issues. In this version letters were ‘signed’ by for example Major Johnny Paul Koromah (the notorious leader of the Armed Forces Revolutionary Council of Sierra Leone), Foday Sankoh, and even Chucky Taylor (the warlords that reigned in Sierra Leone and Liberia during their wars). Yet others were ‘signed’ by Joseph Kabila, Mobutu Sese Seko, and Jonas Savimbi – all associated with conflicts in Africa. Some letters were ‘authored’ by the relatives of ‘white Zimbabwean farmers’ who had either managed to escape the violence unleashed by the Robert Mugabe regime, or were trapped in Zimbabwe but had knowledge of the existence of a ‘trunk load of currency’ deposited by their parents at a security company in for example South Africa or elsewhere.

Once the recipient of the scam letter shows interest and contacts the scammer, the scammer generally requests personal or company details, including banking details. If provided, the scammer produces fake documents supposedly issued by the government authorities or a security company. Some researchers believe that the banking details of such victims are used to access the money in their accounts.14 However, it is more likely
that the scammer's aim is to give the transaction the flavour of a genuine business deal. Possibly the scammer will try to use the victim's banking details if he does not succeed in convincing the victim to transfer funds to him, but this would entail a higher level of expertise and organisation than the AFF perpetrators generally possess. While this type of crime might require a better organisation, it does not necessarily mean that it will qualify as organised crime as it might be a once-off event amongst the group.

Once details have been provided, the next step is to convince the victim through a series of telephone, fax and e-mail communications to pay an advance fee to the scammer in order to settle a myriad of ‘unforeseen’ problems. This is determined by the storyline used by the scammer and could entail payment of a government-imposed tax on the funds before it can be transferred, to secure the services of an attorney, or to bribe a corrupt government official to release the funds. In some situations, the victim is convinced to meet with the scammer, especially where the scam involves a trunk or box of money. Here money is again elicited to ‘wash’ or ‘clean’ the money in order to get the victim to commit more funds for the purchase of the ‘chemical’. The scammer will come up with a whole series of different excuses to explain why the victim needs to pay more money, until the victim either becomes suspicious or simply gets tired of committing still more funds.

With the transformation of the communications industry, the AFF scheme also transformed. While the scammers originally posted or faxed letters to foreign destinations, the Internet made it possible to reach a greater number of potential victims more easily and more cheaply. The Internet to a large extent led to the proliferation of the crime. Before Internet access a novice in the crime network would require the sponsorship of a ‘boss’ to post or fax letters, but the novice could now pay for Internet access at one of the many Internet cafés allowing him to operate on his own.

The revolution the Internet brought about in AFF can be better understood when one reflects that there are Internet cafés that offer overnight browsing facilities in most cities where AFF letters are said to originate. Anecdotable evidence suggests that such facilities allow the scammers to send out e-mail propositions throughout the night without being disturbed. The extent of the new wave of communication on AFF is aptly captured by Findlay, who states that it has led to the ‘transformation of crime beyond people, places and even identifiable victims’. The added advantage of the technological explosion is that it makes it extremely difficult to trace the perpetrators, for individual criminals who are targeted by law enforcement agencies can simply wind up the scam network and acquire new identities.

Another ‘advantage’ of the Internet is that it enables AFF scammers to communicate with a wide range of people through online software, such as d-mailer, advanced mail sender, extreme extractor, and e-mail address finder. These enable the scammer to send
out over a million letters at the touch of the button without being physically present, as the software harvests e-mail addresses and sends out the scam letters to them. A further implication of the Internet is that while the scam letters were originally sent mainly from Nigeria, they now originate – or at least bear an address from – Burkina Faso, Togo, Ghana, Cameroon, Liberia, Côte d’Ivoire, Sierra Leone, the Democratic Republic of Congo, Kenya, Zimbabwe, South Africa, the United States of America, Canada, the United Kingdom, the Netherlands, Japan, China or Hong Kong. This wide geographical spread indicates that the crime has assumed a serious transnational dimension and needs to be addressed as such.

The international spread of this crime presents us with two assumptions. One is that as a result of Nigerians’ penchant for foreign travel they carry on with the crime in whatever country they reside in. Second, other nationalities may have tapped into the transnational nature of the crime to defraud others.

Evidence suggests that the two propositions above account for the transnational proliferation of the scam. For instance in 2000, the Southern District of Texas successfully prosecuted a number of Nigerians for AFF whereas an Australian victim of AFF allegedly defrauded Australian investors of $700 000 using the same technique that was used to defraud him. There is also evidence that a large number of AFF scammers moved to South Africa where they continued their fraudulent activities. It has been suggested that criminals are attracted to South Africa because it has a first-class infrastructure and an apparently weak policing system that was originally focused on fighting communism and the emergence of blacks on the political scene. However, there is no indication that these scammers are all of Nigerian origin.

Despite the network of criminal gangs engaged in AFF, there is no indication that it is organised and structured under any type of hierarchy. Most of the time individual criminals could operate alone and without cooperating with each other. This is always the case where a particular scammer has perfected the art to the extent that he can assume multiple personalities. He could then start and execute his scam all by himself, especially where there is no need for physical contact between himself and the victim.

There is a definite link between AFF and other crimes, especially drug smuggling, and recently also stolen cheques. During the course of this research the author found that there was occasionally a ‘cross-over’ between the two types of crime, especially from the drug-dealing world to the world of AFF, as the drug ‘route’ tightens. Since one does not require any expertise to start the scam, a drug dealer would have little difficulty to start using it himself. If the process becomes complicated, he could turn it over to an ‘expert’ but still retain a percentage share of the proceeds. Another link is to drug criminals, as especially one of the ‘bosses’ could sponsor the scam, from sending the letters to the final steps. It was not clear whether the reverse was true and if AFF perpetrators cross
to drug smuggling. However, this does not entirely rule out the possibility that it might happen, especially since the proliferation of the AFF scam letters and because people’s awareness of the scam have reduced considerably the number of victims. Research further revealed that there are ‘feeder’ crimes that are linked to AFF. These include currency counterfeiters who sometimes work with the scammers by providing the fake currency used in the ‘washing’ scheme. Illegal telephone operators have also been known to work with the scammers.

Some of the perpetrators see the AFF as a way of acquiring start-up capital for a legitimate business, but others see it as a business on its own. It is likely that this second category of scammers would gravitate from AFF to other crimes in order to maintain their lifestyle. It is equally likely that this group will stop at nothing to get their potential victims to provide them with funds, and once they realise that AFF is no longer lucrative, they may diversify into other criminal activities.

The AFF scam is no longer geographically restricted to Nigeria, and neither are the perpetrators and victims. It could therefore be argued that the stereotyping of the crimes as Nigeria AFF denudes the crime of its international dimension. Therefore, to better understand AFF, the crime ‘must be located within the framework of this transnational … crime rather than being treated in isolation’.25

Legal responses to advance-fee fraud

Despite the world focus on organised crime, there are still debates about its parameters, which are fuelled in part by the preoccupation of Americans and others with the Mafia and other organised crime groups.26 The difficulty in defining organised crime led Robert G Blakey to conclude that ‘it is probably best to avoid trying to use “organized crime” as a legal concept’.27 The terminology is often loosely used as a ‘catchphrase to express the growing anxieties of national and supranational public institutions and private citizens in view of the expansion of domestic and world illegal markets, [and] the increasing mobility of criminal actors across national borders’.28 Peter Reuter defines organised crime as consisting of ‘organizations that have durability, hierarchy, and involvement in a multiplicity of criminal activities’.29 It is defined in the Federal US law, the Omnibus Crime Control and Safe Streets Act of 1968, as ‘the unlawful activities of members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labour racketeering, and other unlawful activities of members of such association’.30 The South African Police Service has adopted the definition of organised crime of the International Police Organisation’s Organised Crime Unit, namely ‘[a]ny group having a corporate structure whose primary objective is to obtain money through illegal activities, often surviving on fear and corruption’.31
In contrast, the United Nations Convention against Transnational Organized Crime did not attempt to define the term ‘organised crime’, but rather defined an ‘organised criminal group’ as ‘a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit’. It further defines a ‘structured group’ as ‘a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of membership or a developed structure’. While the definitions differ with regard to the technical aspects of what constitutes organised crime, one common denominator is the structured nature of such organisations.

From the discussion on the modus operandi of the AFF scam network, it is clear that it is not ‘a structured group’ since it generally requires only a single individual to operate the scam. Even where a group is formed, it is mostly a temporary arrangement for the execution of a particular job and hence does not qualify as a ‘structured group’ as defined. Therefore AFF does not qualify as organised crime. With regard to organised crime it should further be borne in mind that the term does not by itself refer to a particular subset of crime, but to any type of crime that is being carried out by a highly organised group.

The transnational dimension of AFF has resulted in suggestions that there should be a targeted international prosecution of the crime. However, this presents some challenges, including the question of cost and delay in such cases. Furthermore, it may not be easy to extradite the suspects, because not all states have extradition treaties. The other legal challenge, arising from the method of sending letters via the Internet, is to determine where the fraud occurred. This is compounded by the fact that these messages may be sent via anonymous re-mailing services which would not only make the origin of the letters difficult to trace but also the person who sent them.

As was argued earlier, it would be a mistake to treat this crime as organised crime, first because of the non-structured nature of the criminal network and second because the ‘network’ is fluid and not confined to one place. This does not mean that states should not address the transnational nature of the crimes: they should make collaborative arrangements to track down and prosecute the perpetrators. However, it will not be sufficient to focus only on the Nigerian criminal network.

The use of local legislation to prosecute the crime seems to be the most effective route for the present. In Australia, for instance, the court can prosecute the perpetrator of an AFF scam in which an Australian is the victim, even where the offenders are located abroad. In Nigeria, chapter 77 of the Criminal Code Act of 1990 provides in section 419 that ‘[a]ny person who by any false pretence, and with intent to defraud, obtains
from any other person anything capable of being stolen, or induces any other person to
deliver to any person anything capable of being stolen, is guilty of felony, and is liable to
imprisonment for three years’. 37

With the advent of Internet scams and the proliferation of AFF in Nigeria, the
government enacted the Advance Fee Fraud and Other Related Offences Act, 38 because
the government felt that the Criminal Code Act could not adequately deal with the
Internet scams. Nigeria also wanted to show that it was serious about curbing the
crime.39 The new law widened the scope of the AFF as originally defined under section
419 to include an invitation of foreigners for the purpose of committing an offence.40 It is
noteworthy that section 5(1) of the AFF Act also makes it an offence to send a letter that
conveys a false pretence.41 Despite these laws, the crime has continued to proliferate in
Nigeria and, in response to international pressure, Nigeria renewed its resolve to tackle
the crime by enacting the Economic and Financial Crimes Commission Act in 2004.
While the Act does not expressly bring the AFF under its jurisdiction, sections 6(b) and
7(2) empower the commission to investigate and prosecute AFF-related offences.42

The corrupt nature and inefficiency of the Nigerian judiciary has been singled out as
key challenges to the successful prosecution of the AFF fraudsters in Nigeria.43 The
weakness of the state structure in Nigeria, especially during the military era, has often
been cited as a reason why Nigeria could not effectively implement the laws to curb the
activities of AFF scammers in its territory, despite a vast array of regulatory frameworks.
This has led to the suggestion that the scammers were enjoying the protection of the
government of the day.44 Some of the AFF scammers argue that the scam is an indirect,
albeit illegal, way in which Africans can recover the continent’s wealth that was looted
by the West during the colonial era.45 While this argument is shallow, it does provide
a psychological insight into the reason why the security apparatus in Nigeria did not
vigorously implement the law when AFF made its debut on the international scene.

However, one would expect countries where the state structures are strong to be able
to implement the laws for effective prosecution of AFF. This implies that states need
to criminalise AFF in general, and not only Nigerian AFF, as it is no longer a localised
Nigerian crime. The overemphasis on its Nigerian origins will defeat the overall essence
of the legal action, as the law enforcement agents would channel their energy towards
tracking down Nigerian scammers while other nationalities perpetrating the same crime
would fall through the cracks.

Although the legal route is regarded as effective in tracking down and punishing the
perpetrators, efforts at prevention must be stepped up, too, particularly with regard to
public enlightenment.46 In this regard the Nigerian Embassy in the US posted a bold
warning from the Central Bank of Nigeria about the AFF scam on its website.47 The
Embassy, together with the Business Council for Development in Nigeria, further
convened an international conference on advance-fee fraud and related offences in New York on 24 September 2002. The governments of most countries also warn their citizens of the dangers of AFF, especially with regard to engaging in business proposals from Nigeria. This warning should extend to engaging in any business that promises the payment of a percentage of the proceeds for an illegal activity originating in any part of the world.

**Conclusion**

While research indicates that the AFF-type of crime originated in Nigeria, fraudulent scams had existed long before the debut of the so-called Nigerian 419 scheme. In order to tackle AFF and its spinoffs, attention should focus on all the different countries and regions where such criminal networks operate. Instead of focusing on the so-called organised nature of AFF, it would be more helpful to focus on the connectivity of crimes. This means that crimes that ordinarily would have been treated as single unrelated events would provide a better understanding of their organised nature if their connection to other types of crimes are uncovered and investigated. Such connectivity would help to define whether organised crime is involved.

Notwithstanding the non-organised nature of AFF crimes, countries need to coordinate their efforts to track down these fraudsters, since globalisation has made it possible for scammers to move from one location to another with ease. Major target and ‘host’ states need to form partnerships for discouraging potential victims of the crime from responding to such fraudulent propositions. Furthermore, Internet service providers should filter unsolicited mail messages, especially those originating from bulk mail services. This should of course be undertaken in such a way as not to disadvantage legitimate bulk mail messages and services. In the final analysis, it is incumbent on states to enact laws that would address the incidence of AFF within their individual jurisdictions.

**Notes**

4 Smith, Holmes and Kaufman, Nigerian advance fee fraud, 1.
5 Interview with G Odenkunle in Lagos, Nigeria, on 11 May 2009.
6 Ibid.
Interview with O Mgbemena in Lagos, Nigeria, on 11 May 2009.


Adogame, The 419 code as business unusual, 6.

Hibou, The ‘social capital’ of the state as an agent of deception, 105.

Ibid, 112.


Ibid.

Discussions with H Shuaibu in Hillbrow, Johannesburg, South Africa, February 2009.

Discussions with A Jeff in Hillbrow, Johannesburg, South Africa, in February 2009.


Discussions with B Chekwube in Braamfontein, Johannesburg, South Africa, in April 2009.

See *United States v Okonkwo* and others, and *United States v Okiti*, reported in Buchanan and Grant, Investigating and prosecuting Nigerian fraud, 44–45.

Smith, Holmes and Kaufman, Nigerian advance fee fraud, 4.


Adogame, The 419 code as business unusual, 6.


Paoli, The paradoxes of organised crime, 51.


Smith, Holmes and Kaufman, Nigerian advance fee fraud, 4.

Adogame, The 419 code as business unusual, 19.

Smith, Holmes and Kaufman, Nigerian advance fee fraud, 4. See also Australia, Victoria, Crimes Act, 1958, section 80A.

Federation of Nigeria, Criminal Code Act, chapter 77.

Federation of Nigeria, Advance Fee Fraud and Other Related Offences Act, 1995.


Ibid.

See sections 14–18 of the Act, which defines offences under the jurisdiction of the Act as being financial malpractices, terrorism, false information, retention of proceeds of criminal conduct, and offences in relation to economic and financial crimes and petitions.

Glickman, The Nigerian ‘419’ advance fee scams, 476.

Ibid.
45 Adogame, The 419 code as business unusual, 8.
46 Smith, Holmes and Kaufman, Nigerian advance fee fraud, 6.
48 Adogame, The 419 code as business unusual.
49 Maltz, Defining organised crime, 25.
The public sector corruption and organised crime nexus: The case of the fertiliser subsidy programme in Malawi

Richard I C Tambulasi

Introduction

The article argues that there is a direct link between corruption and organised crime. A case study of the Malawi fertiliser subsidy programme is used to highlight the fact that corruption not only gives rise to organised criminal groups but also acts as a lubricant for the effective operation and survival of such groups. In this regard, the prevailing corruption has given rise to organised criminal groups who have hijacked the whole process and either smuggled the subsidised fertiliser to other countries or took it for their personal use. The problem has been exacerbated by the international dimensions of the crime and the fact that traditional leaders, politicians and government officials have been key players in the process, thereby intensifying the corruption/organised crime nexus.

Keywords public sector, corruption, organised crime, fertiliser subsidy, Malawi
This in turn has had a negative effect on the poor, who were supposed to be the primary beneficiaries of the programme.

**Conceptual underpinnings**

**Organised crime**

‘Organised crime’ is a notoriously slippery concept to pin down as there is little agreement about how the term should be defined. There has been an overwhelming renewed interest in the study of organised crime with each study taking a particular perspective. As Paoli pointed out, organised crime has ‘suddenly become a hot topic of public discourse all over the world’. Moreover, the concepts of terrorism, corruption and violence which have characterised recent studies of organised crime have expanded the concept even more. This is complicated by the fact that with globalisation, the concept of organised crime has taken on an international and transnational focus. To add to the confusion, some authors have suggested that the concept of ‘organised crime’ be replaced with ‘illicit enterprise’ to encompass the range of criminal activities included in the concept.

It is beyond the realm of this article to delve into this discussion, but suffice it to say that at the most basic level, organised crime is considered to be a ‘continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand; its continuing existence is maintained through the use of force, threats, monopoly control, and/or corruption of public officials’.3 From this perspective the main ‘aim of organised crime is thus profit, characterised by the use of criminal activities carried out by people or groups of people operating in a well- or highly-organised manner’.4

The actual size and interconnections of organised criminal groups are not of any concern in this definition, for ‘two persons are the minimum required to engage in a criminal conspiracy, so any group of two or larger suffices’, nor is it ‘necessary for these participants to be part of a pre-existing organised crime group’.5 These qualifications require a shift of the unit of analysis from the ‘groups’ to the products, services and mode of operation necessary for a group to be defined as an organised crime group. For this reason Maltz classified organised crime into three main manifestations, namely common crime (mala in se), illegal business (mala prohibita), and illegitimate business (white-collar crime).6 From this perspective, there are two markets for organised crime products, namely ‘the markets of goods and services which are forbidden and … the markets of permitted goods and services which are offered or handled by means of lawbreaking’.7 This categorisation of crime manifestations, which narrows down to particular markets, necessities moving from the traditional concentration of organised
crime that focuses only on illicit goods and services (drug trafficking, human trafficking, firearms) to a broader analysis of organised crime which would be very relevant to the African context.

Corruption

Generally, corruption is regarded as the ‘illegal transfer of public resources from public to private use’ which involves the ‘misuse of public power for private profit’. However, the specific definition of the concept of corruption depends on the context and subject of the particular study under investigation, because the concept of corruption has ‘cultural and moral connotations’. To adequately operationalise the concept of corruption in the context of organised crime, this article views corruption as pointing to ‘behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence’. There have also been attempts to draw a litany of activities that qualify into the ambit of corrupt activities, including embezzlement, nepotism, bribery, extortion, favouritism and fraud. However, if organised crime is brought into the equation, the list is never exhaustive. Suffice it to say that ‘goods and money appear to be the weak points in relation to corruption’.

Corruption and the organised crime nexus

The nexus between corruption and organised crime is under-established and at best only assumed. However, there is a direct linkage between corruption and organised crime so that ‘corruption and organised crime are much more than an isolated criminal phenomenon’. In most cases corruption is used to co-opt ‘government officials to mitigate the ability of law enforcement, regulatory, or other agencies that are directly responsible with interdicting or eradicating … criminal groups’. The role of corruption in organised crime is ‘not only in diluting deterrence but also as a strategic complement to crime and therefore a catalyst to organized crime’ so that organised crime and corruption ‘feed’ on each other.

Corruption, terrorism and violence are regarded as key instruments that criminal groups use in their activities. However, despite the important role of terrorism and violence in organised crime, the single most workable instrument for organised criminal groups is corruption. The use of corruption is preferred because whereas violence and terrorism eliminate an adversary, ‘corruption creates an accomplice whose utility continues in time’. In Africa, most organised crime activities involve collusion with public sector officials, and in such situations corruption is the most effective way of operation. It also entails, ‘powerful private actors, including criminal groups and wealthy business interests, [who] buy off weak politicians and bureaucrats. Therefore it is not surprising
The fertiliser subsidy programme in Malawi

After years of continuing food crises, Malawi has been implementing a fertiliser subsidy programme since the 2005 growing season in order to boost its food self-reliance capacity. The rationale for the establishment of the fertiliser subsidy programme was that ‘hunger and recurrent food crises are best responded to by supporting agriculture, and this means providing subsidies to get agriculture moving’.

The programme offers fertiliser to the poor at a much-subsidised price so that they can benefit from farm input which they would not have been able to afford at prevailing market prices. Only those categorised as poor (by whatever criteria used) benefit from the programme. The beneficiaries are given coupons that they use to buy fertiliser at the subsidised rate. In 2005, for example, the subsidised fertiliser was being bought at K950 when the market price was K4 000. The 2007 price for subsidised fertiliser was K900 and in 2008 it was K800. The subsidised price is set to be further reduced to K500 for the 2009/10 growing season. The use of fertiliser subsidies in Malawi is vital as the country’s economy is based on agriculture and the great majority of the country’s workforce consists of subsistence farmers.

The fertiliser subsidy programme has generally been heralded as successful because of the resultant abundant yields. For example, from 2005 when the fertiliser subsidy programme was implemented, the country has had food surpluses and some produce is even being exported to neighbouring hunger-stricken countries such as Zimbabwe, Lesotho and Swaziland. A representative of Malawi’s Food and Agriculture Organisation (FAO) hailed the fertiliser subsidy policy as a ‘pro-poor policy, which could and has already alleviated a lot of suffering of the people’. The fertiliser subsidy programme has also won several presidential awards, and also some from the FAO. Moreover, it has served as a role model for countries that are contemplating the implementation of a similar programme.

After the initial successes, donor institutions that were initially not in support of the programme as it conflicted with their neoliberal policy ideals later began funding it.

Corruption and organised crime in the programme

Malawi, like most countries in Africa, is affected by the problem of organised crime. The situation is exacerbated by the country’s porous borders and geographical location, which have made Malawi a ‘target route for small firearms trafficking and small firearms related crimes’ as well as other organised crimes. In Malawi, organised
crime is ‘conducted by a complex and changing network of criminal groups and organisations’ that engage in various kinds of crimes, including banditry, corruption, racketeering, theft and smuggling of mineral resources, motor vehicle theft and smuggling, trafficking in illegal drugs and small arms, poaching and cattle rustling, money-laundering and fraud. The activities also extend to essential food resources and farm produce.

The fertiliser subsidy programme has not been spared in this regard. Using corruption as their modus operandi, organised criminal groups have infiltrated the programme to obtain both subsidised fertiliser and coupons. The networks involve a diverse group of people ranging from chiefs, government officials, politicians, coupon printers, businessmen, and truck drivers to foreign nationals who are part of organised groups. They have been referred to in the media as ‘fertiliser theft syndicates’, ‘coupon syndicates’ and ‘rackets’. The fertiliser subsidy corruption networks are so complex and highly organised that even the police have acknowledged that the matter is a ‘mystery’ and a ‘shock to us’. Even President Bingu wa Mutharika acknowledged the presence of such criminal groups and admitted that the fertiliser ‘coupons have landed in wrong hands’ and that ‘unscrupulous people [are] … stealing the coupons and selling them’.

Three types of syndicate are conducting fertiliser theft in Malawi, namely syndicates who steal the actual fertiliser, groups that steal coupons, and others that use fake coupons that they either sell or use to purchase the fertiliser at the reduced prices.

**Subsidised fertiliser theft syndicates**

Fertiliser theft syndicates are groups that smuggle the subsidised fertiliser to both local and international markets. These groups divert fertiliser in transit or obtain it from depots of the Agriculture Development and Marketing Cooperation (Admarc), which are the points from which the fertiliser is distributed. Their strategy is to corrupt Admarc officials or truck drivers. For example, fertiliser in transit to an Admarc depot was diverted and resulted in the arrest of 17 businessmen in Lilongwe in ‘connection with a syndicate that was diverting fertiliser worth millions of kwacha meant for the subsidy programme and selling it on the open market’. This fertiliser was being ‘delivered at a private residence’. The syndicate bribed truck drivers to deliver the fertiliser elsewhere and not to the designated Admarc depots. The truck drivers would then produce genuine ‘goods received notes’ signed and stamped by participating Admarc personnel at the depots where the deliveries were supposed to have been made. The drivers would pretend that the fertiliser had in fact been delivered.

In other cases the subsidised fertiliser is stolen from Admarc depots. In one case the police in Lilongwe arrested four people and impounded two trucks carrying subsidised
fertiliser which had been stolen from an Admarc depot during the night. The four had conspired with an Admarc unit marketing manager to carry out the theft. It was established that the two trucks had been hired but the police were unable to trace the owners (implying that the syndicate is made up of more people than the ones present at the crime scene). In most cases those present are only frontliners and the actual ‘owners’ or ‘bosses’ of the syndicate control operations from remote locations.

In some cases the organised criminal groups use traditional leaders in their operations. Traditional leaders command a high degree of respect in their communities and are regarded as havens of safety by criminal groups. The criminals usually bribe the leaders to collect the fertiliser from the Admarc depots and later hand it to the criminals at agreed ‘safe’ locations. Chief Chilowamatambe of Kasungu was for example found in possession of 170 bags of fertiliser he had obtained unlawfully at the Kasungu Admarc through expired fertiliser coupons. More bags were found at the residence of one of the chief’s friends. When the police questioned the chief, he claimed that the ‘fertiliser belonged to some people in his area … who all assembled their coupons and gave them to him as their traditional authority, so that he could buy the fertiliser from Kasungu Admarc on their behalf’.

### Fertiliser coupon theft syndicates

There are also organised criminal groups who fraudulently obtain fertiliser coupons. They either sell the coupons themselves or use them to buy fertiliser that they either resell or supply to fertiliser syndicates. To obtain the coupons, the syndicates use corrupt relationships with a variety of people such as workers at coupon printers, traditional authorities, and government officials.

At coupon printers, for instance, organised criminal groups would enlist the help of a worker so that she or he can steal coupons from the printing house and supply them to syndicates who would either provide a market for the coupons or co-opt the employee to the organised crime network. Examples in point include workers at Montfort Press (a printing house that was mandated to print coupons) who were stealing printed coupons. At Design Printers in Lilongwe one of the workers, Kate Mphampha, was found in possession of 360 coupons for subsidised fertiliser and farm inputs destined for Kasungu district.

Traditional leaders are also targeted as they were mandated to distribute coupons to their subjects when the fertiliser subsidy programme was implemented in 2005/06. This process was later terminated because most of the chiefs were selling the coupons to criminal groups that would later buy the subsidised fertiliser. Some of the traditional authority chiefs who were arrested because they were selling fertiliser subsidy coupons were Chitukula of Lilongwe, Chikowi of Zomba, Mchilamwela of Thyolo, and Mpando
from Ntcheu – the latter was arrested together with five members of his development committee.

Although coupon distribution became the task of Ministry of Agriculture personnel, the situation did not improve. These workers also obtained the coupons by corrupt means and provided them to organised crime networks. In one case an agriculture extension officer created a whole ghost village to whom he ‘distributed’ coupons. Another officer, Erasmus Mgala, used a ‘non-existent village to get subsidised fertiliser coupons which he is said to have been selling’.42

Politicians, including ministers, have been implicated in the coupon racket. They use their political influence to obtain coupons from the Ministry of Agriculture which they then pass on to their colleagues or criminal groups for sale. Often political patrimonial linkages rather than the required bureaucratic procedures would determine the distribution channel, which would be marred by further corruption and illegal activity.

An example is that of the former Minister of Defence, Bob Khamisa (from the ruling Democratic Progressive Party), who obtained 2 000 coupons from the Ministry of Agriculture and handed 400 of them to Philip Bwanali, the Deputy Director of Research of the United Democratic Front (opposition party). Bwanali was later caught selling the coupons to a businessman. In his defence Bob Khamisa stated that:

I want to refute in strong terms reports that the President gave me 200,000 coupons, when what I got was only 2,000. I did not get the coupons from the state president but from the Ministry of Agriculture. Bwanali pleaded with me that he had some poor people he wanted to assist in Bvumbwe. He said the people had not received coupons and were asking from him. I have nothing to do with how Bwanali used the coupons.43

However, in the final analysis the distribution of fertiliser coupons is supposed to be undertaken by the Ministry of Agriculture and not by any other ministry or minister.

**Fake coupon syndicates**

The subsidised fertiliser programme in Malawi has also seen the proliferation of fake coupons. Here criminal groups print and sell fake coupons to unsuspecting citizens or use fake coupons to buy fertiliser which is then resold at much higher prices. According to the police, ‘middlemen’ are often used by these syndicates and the police are still searching for the primary suspects.44 Some of the groups use traditional leaders as their middlemen, for they are regarded as being above suspicion. For example, a senior group village headman of Traditional Authority Lukwa in Kasungu was ‘arrested after he was involved in production and selling of fake government subsidised fertiliser coupons’.45 There are even cases where the criminals have sent unsuspecting children to buy the
subsidised fertiliser at Admarc depots using fake coupons. According to a report in the *Daily Times*:

… a man sent four young boys to buy the subsidised farm inputs at an Admarc depot and after the first three boys bought the inputs, the last one was asked by the clerks to explain where he got the coupons. He shivered before disclosing that he was instructed by a certain man to buy the farm inputs on his behalf and that he was not the only one …

Although it is difficult to pin down the extent of corruption in the production and sale of fake coupons, the coupons provide an opportunity or a recipe to corrupt officers at all levels. After all, the continuous production and distribution of the fake coupons would depend on a bribe or two to those in the relevant authorities.

In most cases, the tools used to ‘authenticate’ fake coupons had been stolen from government offices and could only have landed in the hands of the criminals through corrupt officials. At Kawale in Lilongwe, four people were found to have been printing fake coupons and the suspects also had government rubberstamps marked MC (Mchinji) KU (Kasungu), and TO (Thyolo), which they used to ‘authenticate’ the fake coupons by marking them with the districts where the fertiliser coupons could be used.

**International dimensions of organised crime in the programme**

Globalisation has facilitated the growth of complex international linkages of organised criminal groups worldwide and the provision of supplies, markets and resources that aid criminal groups has taken on an international dimension. Criminal groups involved in the Malawian fertiliser subsidy programme rely on international networks to facilitate their activities. There are three manifestations of this. First, people of other nationalities also have connections with criminal groups involved in fertiliser subsidy scams in Malawi; second, some fake coupons have been produced in countries other than Malawi; and finally, foreign countries provide markets where the smuggled fertiliser is sold.

**Foreign nationals as members of organised criminal groups**

The first international dimension of the organised criminal groups dealing with the fertiliser subsidy programme in Malawi is that they command an international membership because of the profitability of the activity. In particular, people of foreign nationalities have provided the logistical facilities for smuggling fertiliser to destinations outside Malawi. In most cases these foreigners are illegal immigrants who work under cover for fear of deportation if they are caught and convicted. They therefore
operate as ‘feeders’ rather than ‘frontliners’. In Kasungu, for example, a Nigerian was earning a commission on coupons provided to frontliners in the organised criminal group. According to the police they had caught the frontliner, a Mr Kamwendo, but they were unable to trace the Nigerian man and even Kamwendo was unaware of his whereabouts.48

Foreign countries as producers of fake coupons

The second international dimension is that syndicates produce fake coupons outside Malawi. This is a more sophisticated form of the crime as it requires fairly advanced technology to print realistic-looking fakes. The country that is usually targeted for the production of fake coupons is South Africa, as it is technologically advanced. The fakes are sometimes so good that, as one police officer stated who caught a man with fake coupons produced in South Africa: ‘It is very hard to tell the counterfeit coupons from the real ones issued by the Ministry of Agriculture, which is probably why he was able to fool people and buy hundreds of bags.’49

Foreign countries as markets for subsidised fertiliser

The last international dimension is that most of the commodity is sold outside the country. With reference to this the World Trade Organisation noted that ‘smuggling of goods is a major problem for Malawi and substantial informal trade occurs across borders’.50 Countries that provide markets for subsidised fertiliser include Zambia, Mozambique and Tanzania. Zambia and Mozambique are mostly preferred because of their proximity to Malawi. This cuts transport costs and generous prices can be fetched. In fact, commentators have noted that Zambia has suddenly become a big market for the subsidised fertiliser, which is selling at high prices.51

Effect of organised crime and corruption on the programme

The corruption and organised crime that has rocked the fertiliser subsidy programme in Malawi has had negative effects, especially on the poor who depend on fertiliser for subsistence farming. The whole philosophy for the institution of the subsidised fertiliser programme in Malawi was to enable the poor to get the much-needed farm input which they would otherwise not get. However, corruption has robbed the poor of the opportunity to access fertiliser. As the chief executive officer of the National Smallholder Farmers’ Association of Malawi (NASFAM), Dyborn Chibonga, lamented: ‘Many farmers will not benefit from the programme because of allegations of corruption.’52 The situation on the ground has been that Malawians who ‘obtain their coupons from government now stand in long queues day after day, however with little success of getting the commodity because it is being appropriated by profit-minded individuals’.53
Government’s efforts to arrest the situation

The government has not turned a blind eye to corruption in the fertiliser subsidy programme stemming from activities of organised crime syndicates and has on various occasions attempted to put an end to it. President Bingu wa Mutharika in particular has shown that he is committed to dealing with the issue. He warned that, ‘if I catch you I will throw you in jail … and I will take the keys so that you do not come back.’54 The political commitment was also clear when he ordered the arrest of traditional leaders involved in organised crime rings and who in the past had been regarded as untouchable for political reasons. Moreover, the President dismissed the Minister of Defence, Bob Khamisa, because of his involvement in the fertiliser coupon scam. Following this presidential cue the police have been on the look-out to arrest those involved. Headlines such as ‘Police bust fertiliser theft syndicate in Lilongwe’, 55 ‘Government exposes coupon syndicate’56 and ‘Police have stopped fertiliser and coupon racket’57 attest to their success.

However, there is a need to strengthen this commitment so that a lasting solution can be found. First and foremost there is a need for a proper policy mechanism to direct the effective implementation of the programme, because at present the fertiliser subsidy programme ‘lacks policy direction and a clear implementation mechanism … [and there is an] … inability to control the coupon system’.58 The Principal Secretary for Agriculture has acknowledged the truth of this allegation, stating that ‘we can not be having a policy for each and every programme. for the subsidy programme we have a strategy in place.’59 Lack of such a policy creates loopholes for corruption on which organised criminal groups have capitalised and which they are still exploiting today.

The other matter that needs attention is improving the capacity of the police so that they are better equipped to stop such crimes. The use of modern technology has meant that organised criminal activities have become extremely complicated and sophisticated. Modern police equipment for detecting fake coupons would go a long way towards uncovering criminal groups since ‘better surveillance and control … reduce the opportunity for small-time organized crimes, which would affect larger organized crime operations’.60 This will also help the police to be proactive in their approach to stopping organised crime rather than being reactive as is currently the case.

Moreover, most of the public sector actors join criminal groups merely to add to their meagre salaries. The problem is that civil servants are poorly paid, particularly in terms of ever-rising commodity prices. This tempts them to become involved with corrupt activities. However, the ‘strategy in relation to corruption for all states should be the elimination of risk … [requiring] … the identification of weaknesses and vulnerable points’.61 Better remuneration packages would go a long way towards reducing the susceptibility of civil servants to organised criminal activities. Better salaries will make corruption more costly and public officers harder to bribe.
Conclusion

Through the corruption prevalent in the fertiliser subsidy programme in Malawi this article has demonstrated that there is a strong link between corruption and organised crime. Corruption both gives rise to organised criminal groups and works as a lubricant for the effective operation and survival of organised criminal groups. The problem has been exacerbated by the international dimensions of the crime and the fact that traditional leaders, politicians and government officials have been key players in the process, thereby intensifying the corruption/organised crime nexus. Consequently, the corruption and organised crime that have racked the fertiliser subsidy programme have had a negative effect, especially on the poor who depend on fertiliser for their subsistence farming. Because of corrupt practices they have limited access to a commodity that had in the past contributed to an improvement in their living conditions.

Notes

8 R Tambulasi, All that glisters is not gold: new public management and corruption in Malawi’s local governance, *Development Southern Africa* 26(2) (2009), 173–188, 116.
12 See Tambulasi, All that glisters is not gold; Tambulasi and Kayuni, Decentralisation opening a new window for corruption.


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Prosecution politics: Recalibrating the role of prosecution within the anti-corruption agency agenda

S Chartey Quarcoo

Introduction

It is the age of anti-corruption, or so we have been told. The new millennium has ushered in a wave of international, regional and domestic initiatives designed to combat public corruption, curtail financial crime, and facilitate the repatriation of stolen assets. To affirm their allegiance to the movement – and meet their international treaty obligations – African nations have promulgated anti-corruption agencies charged with prosecuting corrupt officials without fear or favour. Yet the politics of prosecution have spelled both peril and promise for these young institutions, raising new questions about the stability of their existing anti-corruption strategies.

Keywords: corruption, prosecution, law, Nigeria, South Africa
At first glance, an anti-corruption agency’s prosecution of the ‘big fish’ – the prominent official once deemed untouchable – suggests that the law reserves no safe haven for the politically elite.

Given the political ramifications of these pursuits, however, an agency’s prosecutorial powers invariably lie vulnerable to partisan application, or the accusation thereof, both of which impugn the agency’s legitimacy. For the nations that have championed them, striking the balance between persistent and political has proved challenging.

This article contends that nations that overemphasise the prosecutorial functions of their anti-corruption bodies risk undercutting their sustainability. The warning appears counterintuitive, as a heightened focus on prosecution might invigorate anti-corruption campaigns long deemed high on rhetoric and low on resolve. Indeed, successful prosecutions presumably evidence a government’s sincere commitment to anti-corruption principles. Yet, unaccompanied by comparable commitment to preventive measures, the prosecution-centric approach places undue burden on a crucial but volatile component of an anti-corruption campaign.

The fates of two such bodies – Nigeria’s Economic and Financial Crimes Commission (EFCC) and South Africa’s Directorate of Special Operations (DSO) – illustrate the precariousness of this pursuit. Each established early reputations for independence by commencing criminal proceedings against high-profile politicians. Yet each saw their conduct trigger virulent debate over the exercise and legal foundation of their prosecutorial authority. Critics reserved particular ire for their perceived flamboyance and dual exercise of police and prosecuting functions. Cast in partisan terms, this debate eventually threatened to overshadow the anti-corruption agendas the agencies were ostensibly created to carry out.

Such is the dilemma confronting many African anti-corruption agencies. Prosecution represents a prerequisite for legitimacy. It is tempting, therefore, to focus predominantly on agencies’ prosecutorial functions when efforts stall or conflicts arise. Yet this narrow focus may divert attention from the systematic reforms necessary to break the bust and boom cycles that have defined numerous post-independence anti-corruption campaigns. Indeed, as the experiences of Nigeria and South Africa exemplify, it may consume and derail the anti-corruption dialogue altogether.

This article suggests that governments must elevate the profile of their non-prosecutorial preventive measures to offset the unique, if unavoidable, challenges that accompany prosecution. First, it considers the rationale behind the anti-corruption body endowed with prosecutorial powers. Second, it examines the political conflicts that jeopardised the prosecutorial frameworks of the EFCC and DSO – and suggests that reforms to those frameworks will not prevent future challenges to their legitimacy. Third, it argues that governments must balance an emphasis on prosecution with increased investment
in preventive measures, not merely to foster comprehensive reform, but to prevent the politics of prosecution from upending their anti-corruption campaigns. This last step presents the greatest challenge, for such measures – from public sector trainings to stricter banking regulations – may add costs, without instant publicity or payoff. Yet, as the EFCC and DSO discovered, publicity is fickle, and much may be lost in translation from legislation to legitimacy.

**The anti-corruption prosecution model**

Africa’s modern anti-corruption agency movement is not without precedent. In the wake of colonialism, newly independent nations turned to myriad instruments – including ad hoc commissions of inquiry and military tribunals – to pursue investigations of public corruption.¹ Yet the rise of permanent statutory bodies mandated to prosecute corrupt officials reflects a renewed effort to harmonise and strengthen domestic programmes once marked by sporadic or anaemic performance.²

Reinforcing this ‘harmonisation’ movement, the African Union Convention on Preventing and Combating Corruption (AU Convention) and the United Nations Convention Against Corruption (UNCAC) both require signatories to establish anti-corruption bodies.³ Neither prescribes a specific framework for those bodies, nor requires that they prosecute offenders themselves. Nevertheless, among alternatives, the statutory body endowed with prosecutorial authority possesses several qualities that compel its emergence.

First, established by legislation rather than ad hoc decree, the statutory body appears to offer a permanence that eluded its predecessors. Early African governments, particularly those entering by force, frequently employed corruption inquiries to discredit ousted regimes and affirm their own legitimacy.⁴ In such cases, hastily assembled commissions exacted swift and furious punishment upon former officials.⁵ Yet they pursued corruption within their own governments less rigorously, often fading into obsolescence after fulfilling their initial function.⁶ Against this legacy, the statutory body promises apparent stability in the face of political change.

Second, prosecutions offer a concrete variable by which to judge an anti-corruption campaign’s success. Commissions may provide prosecution and conviction rates to donors, investors and citizens alike as an objective gauge of their performance. By contrast, early preventive measures, such as requirements that public officials declare their assets, proved difficult to enforce and slow to measurably reduce corruption.⁷ More significantly, they garnered less public attention than the pursuit and punishment of corrupt officials.⁸

Third, in an era in which corruption increasingly involves the transfer of illicit funds to offshore accounts, prosecution often remains a prerequisite for the repatriation of
stolen assets. Both UNCAC and the AU Convention require signatories to offer mutual legal assistance to countries seeking to repatriate funds pilfered by officials, and hidden overseas.\(^9\) To facilitate recovery, requested states must first confiscate the assets in question.\(^9\) Yet many nations refuse to permit confiscation if a requesting state has yet to secure a criminal conviction.\(^11\) Thus, a government’s prosecution capacity may directly impact its ability to secure foreign assistance and reclaim criminal proceeds.

**Nigeria and South Africa:** frameworks and challenges

Nigeria’s EFCC and South Africa’s DSO comprised two of the continent’s most touted anti-corruption agencies. Only the former remains intact. Both shared international notoriety, as much for praise abroad as for controversy at home. They hailed, however, from opposite ends of the structural spectrum. The EFCC boasts a multi-purpose mandate and structure evocative of Hong Kong’s oft-replicated Independent Commission against Corruption (ICAC).\(^12\) Established outside the office of the Attorney General, it harbours research, training and public education responsibilities, in addition to investigation and prosecution duties. The DSO, by contrast, oversaw a narrower jurisdiction. Created as a unit within the National Prosecuting Authority (NPA), it possessed a mandate more specifically tailored to the goal of prosecution. Yet notwithstanding their differences, both offer cautionary tales of prosecution politics gone awry.

**The frameworks**

**Nigeria**

In truth, the EFCC represents neither Nigeria’s first nor its sole existing anti-corruption body. The Corrupt Practices and Other Related Offences Act, 2000 (Corrupt Practices Act) established its precursor, the Independent Corrupt Practices Commission (ICPC), to investigate and prosecute corruption.\(^13\) Yet, coming on the heels of the ICPC’s perceived stagnation, the EFCC has evolved into Nigeria’s premier anti-corruption body – its reputation for excellence and controversy burnished by its inaugural chairman, Mallam Nuhu Ribadu, and his proclivity for prosecuting the ‘big fish’.\(^14\)

By design, its mandate extends beyond prosecution. The Economic and Financial Crimes Commission Establishment Act, 2004 (2004 Establishment Act) charged the body with ‘supervising, controlling, [and] coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offenses connected with or relating to economic and financial crimes’.\(^15\) Its wide responsibilities include investigation; asset tracing and confiscation; mutual legal assistance; preventive research; and public education.\(^16\) To execute its enforcement duties, the Act bestows
EFCC investigators full police powers, including the right to bear arms and authority to seize property incident to arrest.

Notwithstanding this breadth, prosecution rests at the top of the EFCC’s priority list. The body’s Legal and Prosecution Unit is one of two to warrant its own section in terms of the 2004 Establishment Act. Its duties include prosecuting offenders, advising EFCC investigators, and facilitating the recovery of stolen assets.

Perhaps inevitably, these latter, flashier functions soon defined the body’s public persona. The EFCC’s inception followed Nigeria’s placement on a list of Non-Cooperative Countries by the Financial Action Task Force (FATF), an intergovernmental anti-money-laundering body. For then President Olusegun Obasanjo, countering the country’s lacklustre anti-corruption legacy – and escaping the FATF’s blacklist – required action capable of capturing both local and international attention. The EFCC’s prosecution of the ‘big fish’ accomplished just that. But not without costs.

South Africa

Introduced by President Thabo Mbeki in 1999, and codified by the National Prosecuting Authority Amendment Act, 2000 (2000 Amendment Act), the aptly-dubbed ‘Scorpions’ were police and prosecutor in one, with the bravado to match.

Charged with prosecuting ‘serious criminal or unlawful conduct committed in an organised fashion’, the body adopted a multidisciplinary methodology – operating investigation, information-gathering, and prosecution functions under one chain of command. To this end, its staff comprised special investigators (its largest component), analysts, and prosecutors. Operations proceeded in two phases: an investigation phase, in which investigators worked under the guidance of an assigned prosecutor; and a prosecution phase, undertaken by the prosecutor who oversaw the investigation itself.

This co-mingling of police, prosecution, and quasi-intelligence powers would both distinguish the unit and precipitate its dissolution. DSO investigators, like their EFCC brethren, enjoyed broad police powers, including the authority to arrest and execute warrants. Unlike the EFCC’s 2004 Establishment Act, however, the DSO’s enabling statute entrenched the body within the country’s prosecuting authority – foreshadowing a jurisdiction war between the NPA and SAPS.

Under the 2000 Amendment Act, the National Director of Public Prosecutions (NDPP) appointed the head of the DSO. The DSO could in turn initiate investigations on its own accord, or upon referral from the NDPP, and pursue matters beyond its mandate if it encountered them during its investigations. All of this transpired outside the command of the SAPS or, at the cabinet level, the Minister of Security Services (MSS).
Indeed, though their powers were subject to amendment by the Minister of Justice in consultation with the MSS, investigators remained appointed by the NDPP and responsible to the head of the DSO – with no direct oversight from the police.

Like the EFCC, the DSO faced high expectations and early scrutiny. In 1999, revelations of an arms procurement scandal implicating the upper echelons of the ruling African National Congress (ANC) shocked the nation. The DSO’s investigation and prosecution of the matter would catapult it into the international spotlight, and near singularly define its legacy. So too would it raise the political stakes of its perceived success or failure.

**Challenges**

The EFCC and DSO both heralded early praise for actively prosecuting the heretofore untouchables. Yet each soon confronted domestic opposition that would expose the greater instability of their countries’ respective anti-corruption campaigns. What prompted this backlash? The reflexive response that the agencies fell victim to their own success, proves reductive.

Both faced charges that their prosecutorial mandates were constitutionally unsound and their selective execution of those mandates betrayed partisan motives. The former implies that revising the bodies’ legislative mandates might reinforce or rehabilitate their legitimacy. The latter, however, signals the futility of predating reform on that narrow basis. In the politicised debates that ensued, each side’s focus on curtailing the sins of the other blurred the distinction between legal structures and the alleged failures of the individuals charged with implementing them. Politics, above and beyond legality, seemed to drive their respective debates.

The following section attempts to separate rhetoric from reform. First, it outlines the recurring arguments advanced against each agency’s prosecutorial mandate. Second, it examines the manner in which these ‘legal’ debates served as proxies for political feuds that first shaped, and then threatened to overwhelm, the dialogue altogether. It suggests that restructuring the anti-corruption bodies’ prosecutorial mandates will not alleviate the underlying volatility that renders prosecution, for all its utility, a precarious anchor for anti-corruption campaigns.

**Nigeria**

Critics of the EFCC’s legal framework have long averred that the body’s prosecutorial mandate usurps the power of the Attorney General. During Ribadu’s tenure, they contended that the 2004 Establishment Act unconstitutionally bestowed the EFCC powers already vested in the Attorney General and the Attorney General’s status as
‘chief law officer’ required the EFCC to obtain his consent before initiating criminal proceedings. Neither position prevailed. Yet the political tensions that informed them persist, suggesting that the EFCC’s prosecutorial discretion may continue to face obstacles.

Nigeria’s constitution describes the Attorney General as ‘the Chief Law Officer of the Federation’. His authority, per article 174, includes the power:

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

How does the EFCC’s legislative mandate comport with the Attorney General’s above authority to start, stop and take over prosecutions? Not well, its detractors warned, for it failed to recognise that those powers granted the Attorney General primary control over all prosecutions. To that end, critics noted that section 6 of the 2004 Establishment Act set forth the EFCC’s general duties without reference to the Attorney General.

The omission stands in stark contrast to the deferential language of prior statutes. Currently, the Act charges the EFCC with ‘taking charge of, supervising, controlling, [and] coordinating all the responsibilities, functions and activities relating to the current investigation and prosecution of all offenses connected with or relating to economic and financial crimes’. Yet the initial 2002 Establishment Act further specified that the EFCC would only discharge those duties ‘in consultation with the Attorney General’. The Corrupt Practices Act includes similar qualifying language, authorising the ICPC to prosecute ‘with the consent of the Attorney General’.

While acknowledging the Attorney General’s basic authority to ‘make rules or regulations’ regarding the EFCC, however, the 2004 Establishment Act specifically avoids mention of his required consent. On its face, it arguably casts the EFCC as the principal authority on matters pertaining to economic and financial crime. This, according to some, runs afoul of the Attorney General’s constitutionally guaranteed role as chief law officer.

The second, corollary, argument challenged the EFCC’s independent authority to initiate legal proceedings. It maintained that as all prosecutorial power derives from the Attorney
General, the EFCC may not commence criminal proceedings on its own initiative; it must first obtain specific consent from the Attorney General. President Umaru Musa Yar’Adua issued a ‘clarifying’ directive to this effect after succeeding Obasanjo in 2007 (on the advice of his own Attorney General, Michael Aondoakaa).

Neither argument succeeded in altering the EFCC’s prosecutorial mandate. Yar’Adua quickly rescinded the directive in the face of contravening case law and the Act still makes no mention of the Attorney General’s required ‘consent’. Yet the debate’s legal façade belied its political foundations and the inherent risks of relying upon prosecution as the primary conduit for anti-corruption reform.

At the time, many interpreted the directive as a direct rebuke of the Obasanjo-Ribadu legacy. Under Ribadu’s command, the EFCC staked its reputation on its pursuit of the big fish. It famously prosecuted then Police Inspector General Tafa Balogun, laid charges against then Vice President Atiku Abubakar, and published a list of 135 ‘corrupt politicians’ on the eve of national elections. Yet, among its critics it earned a reputation for disregarding court orders, prosecuting suspects through the media, and targeting Obasanjo’s enemies (including Abubakar who, critics noted, had opposed amendments that would have permitted Obasanjo to run for a third term).

Against this backdrop, Ribadu’s detractors welcomed the directive on grounds that it would curtail the body’s partisan crusade. His defenders conversely accused Yar’Adua of weakening the EFCC’s independence to obstruct its pursuit of his loyalists, some of whom had previously opposed Obasanjo. Irrespective of their merits, these cross-charges underscored the extent to which legal arguments about the EFCC’s mandate were supplemental to the more contentious issue of who the EFCC targeted.

They also raised the political stakes of intra-governmental ‘turf war’. Governments may frequently face tensions between departments with overlapping mandates. Yet in the battle for predominance between the EFCC and the Attorney General, fealty to one side now inferred commitment to a larger partisan faction: Ribadu-Obasanjo or Yar’Adua-Aondoakaa. In this context, subsequent disputes – such as which office would oversee the prosecution of former state governor Orji Kalu, an Obasanjo opponent and Yar’Adua ally – proved more inflammatory than their procedural façades would suggest. Though expressed in the legal terms, the politics of prosecution overwhelmed the debate itself, and in so doing, threatened the stability of the nation’s anti-corruption framework.

All of this leaves prosecution no less vital to the anti-corruption campaign. Yet its capacity to entrench partisan divisions, both within and without the structures of government, weighs against an imbalanced reliance upon its utility. By 2008, Ribadu had been demoted, removed from office and, by his account, forced into exile by threats upon his life. His successor, Farida Waziri, encountered immediate resistance for questioning...
Ribadu’s tactics and his prior charges against state governors. Both may have had the courage of their convictions. Yet navigating Nigeria’s anti-corruption campaign through these assaults on the EFCC’s legitimacy requires more than prosecution can offer. For as Ribadu discovered, that which prosecution builds, it may tear down as well.

**South Africa**

As the DSO earned international acclaim for its arms procurement investigation, domestic critics assailed its legal framework on two interrelated grounds. First, they argued that the DSO’s police powers violated the constitution’s provision of a ‘single police service’. Second, they argued that the unit’s tri-partite mandate was overbroad and enabled it to operate non-prosecutorial functions ‘free from constitutional checks and balances’. These arguments would fail and succeed at the same time.

South Africa’s constitution dictates that ‘[t]he security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution’. The DSO’s critics asserted that its framework breached this provision. They contended that, as the DSO initiated its own cases and employed investigators endowed with police powers, it effectively constituted a police force and infringed upon the SAPS’s authority. They further argued that the DSO’s mandate granted it intelligence powers outside the regulatory framework outlined in the constitution.

Within the isolated realm of legal debate, these challenges would not prevail. Responding to rising tensions between the DSO and SAPS, then President Mbeki commissioned Judge Sisi Khampepe to analyse the ‘jurisprudential soundness’ of the DSO’s mandate. Khampepe found ‘nothing unconstitutional in the DSO sharing a mandate with the SAPS’. Neither, she concluded, did its exercise of police functions render it a ‘police’ force. Her report did critique the DSO’s failure to coordinate with other bodies and warned that its ‘information-gathering’ mandate did not give it license to exercise full intelligence functions. As to the constitutionality of its tri-partite framework, the judge found ‘no legal impediment in having a structure such as the DSO with all the disciplines that it has falling in one ministry’.

In practical terms, however, these legal challenges provided cover for the ANC’s political decision to dissolve the body. In 2008, South Africa’s Parliament passed legislation effectively codifying the ANC’s 2007 conference resolution to disband the DSO. Its successor, the Directorate of Priority Crime Investigation (DPCI), would retain a dedicated corps of investigators and, when necessary, second prosecutors to provide assistance. Yet it would fall under the command of the SAPS and prohibit ‘investigative prosecutors’ from participating in the subsequent prosecution of their targets.
As with the EFCC, the legislative debate over the DSO’s mandate belied schisms unlikely to be resolved by structural reforms to the body’s framework. The unit’s investigations had exposed public procurement irregularities and the purported bribery of key ANC members by foreign arms companies. Not surprisingly, its prosecution of select officials – including then Deputy President Jacob Zuma – fuelled partisan cross-claims, with ANC members decrying its ‘political’ motives and opposition parties lambasting the ANC’s ‘unethical’ character.

Party affiliation was not the only variable shaping the debate. Race, and the spectre of South Africa’s apartheid past, added additional pressure points. The symbolic contrast between the DSO’s predominantly white officers and its predominantly black targets gave rise to accusations that it harboured a racist agenda and even employed former apartheid operatives.

The visceral nature of these divisions suggests that merely restructuring the prosecutorial mandates of South Africa’s anti-corruption bodies will not alleviate their underlying conflicts. To its credit, the mandate discourse draws attention to some valid issues. Reducing the overlap between the NPA and SAPS could ostensibly mitigate tensions between the bodies. Yet it cannot address, or rectify, the deeper tensions that threatened to destabilise the nation’s anti-corruption framework. For, as in Nigeria, those divisions turned less on legality than on who the body prosecuted, and at what socio-political cost.

Consider the shifting alliances and fissures that emerged after then NDPP Vusi Pikoli announced corruption charges against two of the DSO’s most high-profile targets: Zuma in 2005 and then National Police Commissioner Jackie Selebi in 2007. In response, Mbeki dismissed Zuma, and suspended Selebi and Pikoli, embroiling both the ANC and DSO in political turmoil.

Zuma loyalists accused Mbeki of dismissing Zuma to undermine his potential as a political rival. Selebi proponents accused Pikoli and the DSO/NPA of prosecuting the police chief to undermine the SAPS and ANC alike. Opposition parties accused Mbeki of suspending Pikoli to protect Selebi from prosecution and Zuma loyalists of placing politics above the rule of law.

For their divergent protagonists, each episode produced a common result: the downfall of the individuals or institutions behind the corruption charges. The ANC recalled Mbeki before the completion of his term; Parliament ratified Pikoli’s dismissal and dissolved the DSO. And just as quickly as prosecuting the big fish had defined the nation’s anti-corruption agenda, so too it instigated its unravelling.

Once again, this tumult does not counsel against prosecution, without which high-profile offenders might continue to loot with impunity. But it does underscore its volatility as
the potential anchor of an anti-corruption campaign and the disjuncture between the legal guise of the mandate debate and its political underpinnings.

If the political bloodletting above evidences the former, the legislative debate that preceded the DSO’s dissolution exemplifies the latter. Early drafts of that legislation empowered the National Commissioner of Police to appoint the Head of the Directorate, relegated that head to a lower rank than his DSO predecessor and eliminated the unit’s authority to initiate investigations without a referral from the National Commissioner.68

Critics contended that these provisions circumscribed the body’s independence and left it at the mercy of a police force already in disrepute.69 None of the provisions would survive intact; the final legislation provided that the MSS, not the National Commissioner, would appoint the Head of the Directorate, elevated his rank to Deputy National Commissioner, and authorised him to initiate investigations without awaiting a referral.70

Yet though they marked moderate concessions, these changes barely featured in either side’s rhetoric. Critics appeared loath to cede credibility to the process that begot the bills, and proponents seemed to fear that acknowledging the virtues of the DSO’s independence would legitimise its pursuit of Selebi and Zuma. While this may not surprise, it suggests that the mandate debate did more than leave the tensions that befell the DSO intact; it preserved them.

Like Waziri succeeding Ribadu, the DPCI inherits a corruption agenda enmeshed in politics. Weeks before South Africa’s 2009 elections, acting NDPP Mokotedi Mpshe dropped the pending charges against Zuma, citing evidence that former DSO head Leonard McCarthy had taken politics into account when instituting them.71 That Mpshe implicitly defended the merits of the case against Zuma did little to temper opposition. The episode sparked criticism from across the political spectrum, with some accusing Mpshe of caving to ANC pressure and others decrying the NPA/DSO’s anti-Zuma bias. More significantly, it kept the politics of prosecution front and centre in the debate over the future of South Africa’s anti-corruption campaign – to the exclusion of a more dispassionate analysis of the campaign’s strengths and weaknesses.

Recalibrating the role of prosecution

This article began with the premise that anti-corruption bodies armed with prosecution powers possess compelling traits for nations that have struggled to curtail public corruption. Yet, it suggested, reliance on those bodies comes with an inherent risk – that the politically charged nature of their pursuits render them lightning rods for partisan conflict. While accepting the utility of prosecution, it examined the costs of depending
on a body's prosecutorial mandate, in fact or appearance, as the central tenet of a nation's anti-corruption campaign.

The experiences of the EFCC and DSO illustrate that ‘mandate debates’ may foster political conditions that undermine the stability of those campaigns. As countries reform their anti-corruption bodies, therefore, they must advance beyond the question of whether to prosecute. Rather, they must consider how to recalibrate the role of prosecution within the panoply of mechanisms at their disposal. For restructuring their prosecutorial powers alone will unlikely provide the sustainability they seek.

To be fair, many countries, Nigeria and South Africa included, have ostensibly implemented non-prosecutorial preventive measures – from anti-corruption hotlines to the ubiquitous asset declaration requirement for public officials. Yet, due to insufficient political will, funding, capacity, or the sheer gravitational pull of high-profile prosecutions, these measures often play second fiddle to their more glamorous counterparts.

We cannot take these challenges for granted. Neither, however, can we realistically expect prosecution to sustain countries’ anti-corruption campaigns while they wait for improved socio-economic conditions to afford them the ‘luxury’ of investing equally in preventive measures. For failure to invest may do more than stagnate those campaigns; it may precipitate their regression.

In the above examples, Nigeria and South Africa highlighted that ‘legal’ reforms to an anti-corruption agency’s prosecutorial mandate may be incongruous with the political factors that undermine its stability; and an imbalanced focus on prosecution may destabilise the agency and anti-corruption campaign alike.

Consider the political tumult each country faced in pursuing its ‘big fish’. In both cases:

- The anti-corruption body launched criminal charges against a sitting vice-president
- The president responded by firing his vice-president, inviting speculation of a conspiracy to undermine the latter’s political ambitions
- The anti-corruption body prosecuted the nation’s chief of police, exacerbating tensions between the two agencies
- The president fired the anti-corruption body’s senior official, fuelling accusations of a plot to stymie the prosecution of presidential allies
- The fired anti-corruption official challenged the legality of his dismissal and publicly questioned the executive’s commitment to anti-corruption enforcement
The political ramifications of these pursuits reveal the limitations of the mandate debate. Amending a body’s prosecutorial authority may mitigate inter-departmental overlaps and the tensions they exacerbate. Yet, with the nation’s highest offices at stake, it is unlikely to lower the political tensions that render high-profile prosecutions inherently volatile. Ultimately the prosecution-centric approach may offer both accuser and accused unintended cover – the former his big fish target, the latter his ‘political martyr’ retort – without fundamentally altering the system within which they both operate.

In this context, a country’s elevation of its preventive measures does more than diversify its anti-corruption agenda; it stands to mitigate the pressures upon its prosecutorial framework. The measures themselves may range from the mundane to the complex, and in some cases, already exist on the books. Yet the potential charge that they represent old wine in new bottles does not invalidate their significance. Their impact may lay less in innovation than in their ability to provide the campaign additional, and less volatile, legs upon which to stand.

Consider the following *ex ante* measures:

- Public sector training, across all levels of government, to educate officials on their anti-corruption compliance requirements and basic management and accounting strategies to reduce the risk of corruption within their departments

- Requirements that public official asset declarations be made publicly available and timely review of those declarations by an independent body

- Enhanced regulation and monitoring of financial institutions and the transactions of politically exposed persons

- Private sector training aimed, among other things, at ensuring that companies audit their corporate compliance systems

- Implementation and enforcement of whistleblower protection legislation

- Collaboration with foreign countries and regional bodies to research and monitor trends in corruption and financial crime

- Transparent review of public procurement bids

Sceptics may understandably contend that such measures lack the publicity to rally broad public support. Yet their less flashy façade may prove an asset as well. While they do not deliver the instant cache of a big prosecution, neither might they provoke the same incendiary responses.
Accordingly, elevating the relative profile of non-prosecutorial preventive measures may serve both pragmatic and political needs.

From a practical side, it may alleviate the burden on a country’s retributive mechanisms by foreclosing opportunities for corruption before they take root. As post-hoc measures, prosecutions deter, yet leave intact the structural weaknesses – poor local government oversight, weak regulation of financial institutions, insufficient monitoring of public officials’ private interests – that foster opportunities for public corruption. A renewed emphasis on prevention may propel the anti-corruption narrative beyond the individual protagonists that often define it – ‘overzealous’ prosecutors and ‘unscrupulous’ politicians – and facilitate systematic reforms that offer less ‘bang’ but greater long-term impact.

From a political side, it may provide the campaign another foundation upon which to rely when prosecutions inevitably encounter obstacles or resistance. Implicated officials may always claim political victimisation, turning legal proceedings into partisan dramas. Yet prosecutions also face administrative obstacles (congested court rolls) and procedural mechanisms (appeals, executive immunity, evidentiary challenges) that prolong the path towards conviction. These delays too may wear out the public’s patience and weaken its investment in the anti-corruption body itself. In the absence of an additional gauge, some may equate prosecutorial struggles with the failure of the anti-corruption framework as a whole – and prematurely disinvest in its potential success.

Of course, having settled on a renewed balance between prevention and prosecution, still-challenging questions remain. If countries are to achieve balance, what form should their respective anti-corruption bodies assume? Should they follow the all-in-one model, charged with both preventive and prosecutorial functions? Should they divide those responsibilities across a multitude of agencies with discrete mandates? Reality belies the likelihood of a one-size-fits-all formula. For some countries, a multifaceted mandate may saddle their anti-corruption bodies with greater burdens than they can sustain, leading them to rely principally on one function or perform all with little depth. For others, the all-in-one model may provide previously lacking cohesiveness.

Yet ultimately, while the models they adopt may vary, one thing appears consistent: if the anti-corruption commission model is to succeed, corruption prevention can no longer play bridesmaid to prosecution – in fact or appearance.

**CONCLUSION**

In truth, anti-corruption campaigns lend themselves all too easily to platitudes and promises. Perhaps, having nurtured a sombre, even fatalistic outlook on their prospects, we look to anti-corruption prosecuting bodies as a potential panacea. Yet without
concomitant emphasis on prevention, nations may stifle their impact at best, and facilitate their regression at worst. At the time of writing, South Africa and Nigeria appear to have adopted divergent approaches to the prosecutorial mandates of their anti-corruption bodies – the former removing prosecution from the DPCI’s jurisdiction, the latter considering amendments that would explicitly authorise the EFCC to prosecute without consent from the Attorney General. Yet, notwithstanding prosecution’s importance within the anti-corruption campaign, the real challenge for Nigeria and South Africa – and the nations that look to them – may lie in their ability to extend the anti-corruption dialogue beyond the politics of prosecution.

Notes


5 See, for example, Osita Nnamani Ogbu, Combating corruption in Nigeria: a critical appraisal of the laws, institutions, and the political will, Annual Survey of International & Comparative Law 14 (2008), 99–149, 104; W Paatii Ofosu-Amah, Raj Soopramanien and Kishor Uprety, Combating corruption: a comparative review of selected legal aspects of state practice and major international initiatives, Washington, DC: World Bank, 1999, 61 (‘[S]uccessive regimes have been known to enforce ... the unjust laws and other reprehensible legal instruments they inherit from their predecessors, subverting them for their own political ends and, in the process, providing their predecessors with a proverbial taste of their own medicine’).

6 See, for example, Bamidele Olouw, Governmental reforms and the control of corruption in Ethiopia, in Hope and Chikulo (eds), Corruption and development in Africa, 265 (‘The approach to tackling corruption in Ethiopian civil services is quite similar to that obtaining in other African countries. It is uncoordinated, piecemeal and sporadic. Every new regime comes to power with a promise to tackle corruption and actually takes some steps to prosecute the corrupt from the preceding administration but such efforts are not sustained over time’).

7 Ofosu-Amah et al, Combating corruption, 61 (‘[L]aws relating to the declaration of assets have been on the books but seldom taken seriously’). See, for example, Okechukwu Oko, Subverting the scourge of corruption in Nigeria: a reform prospectus, New York University Journal of International Law & Policy 34(2) (2002), 397–473, 431 (asserting not only that public officers refused to report their assets, but that as of 2001–2002, ‘no public officer ha[d] ever been arraigned before the Tribunal for violating the Code of Conduct’).

8 As Alan Doig asserts, ‘the danger is that corruption prevention lacks the drama and public relations of high profile prosecutions’: Alan Doig, David Watt and Robert Williams, Measuring ‘success’ in five anti-
9 AU Convention, article 19; UNCAC, article 54.
10 Willie Hofmeyr, Navigating between mutual legal assistance and confiscation systems, in Mark Pieth
11 Daniel Claman, The promise and limitations of asset recovery under the UNCAC, in Pieth (ed),
Recovering stolen assets, 347. UNCAC article 54(1)(c) directs signatories to consider taking measures to
permit non-conviction based confiscation, but the provision is non-mandatory.
12 Created in 1974, Hong Kong’s ICAC popularised the all-in-one anti-corruption model that many
African countries would soon follow. Its Corruption Prevention Department analyses agency practices
and provides advice and training, its Operations Department conducts criminal investigations, and its
Community Relations Department runs public education programmes.
14 Oluseye Foluoso Arowolo, In the shadows of the EFCC: is the ICPC still relevant?, Journal of Money
May 2007).
16 Ibid, section 6.
17 Ibid, section 8(5).
18 Ibid, section 26(1).
19 Ibid, section 13.
20 Ibid.
21 Nigeria was placed on the FATF list of non-cooperative countries in 2001; it was de-listed in 2006:
September 2009).
24 Ibid.
25 National Prosecuting Authority Amendment Act, 2000, section 30(a) (A special investigator has the
powers as provided for in the Criminal Procedure Act, 1977 (Act No 51 of 1977), which are bestowed
upon a peace officer or a police official, relating to (a) the investigation of offences; (b) the ascertainment
of bodily features of an accused person; (c) the entry and search of premises; (d) the seizure and disposal
of articles; (e) arrests; (f) the execution of warrants; and (g) the attendance of an accused person in
court).
26 Ibid, section 7(3)(a).
27 Ibid, section 28(1)(a).
28 Ibid, section 28(1)(b).
29 Ibid, section 30(b).
31 Ibid, section 7(4)(a)(v).
32 See Andrew Feinstein, After the party: a personal and political journey inside the ANC, Cape Town: Jonathan
Ball, 2007.
33 Nigerian constitution, article 150.
34 Ibid, article 174.
35 See Chioma Gabriel, EFCC’s enabling law is ultra vires constitution – Ben Nwabueze [interview],
Vanguard, 8 October 2007.
36 Ibid.
40 As an added complexity, section 7 does not include prosecution of the agency’s special powers – a point
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41 See Gabriel, EFCC’s enabling law is ultra vires constitution.

42 See Ise Oluwa Ige, Controversial directive on EFCC, Vanguard, 13 August 2007 (quoting Special Adviser on Communications Segun Adeniyi).

43 Ibid. Anticipating opposition, the administration hastened to add that it issued the directive out of respect for due process and the rule of law and not by any desire to shield anybody from criminal prosecution’.

44 See Femi Falana, Anti-graft agencies and AG, This Day, 8 October 2007.

45 In 2005, the EFCC arrested Balogun on money-laundering charges. He was eventually convicted for the lesser crime of failing to comply with law enforcement.

46 The EFCC accused Abubakar of diverting US$125 million from the government-owned Petroleum Trust Development Fund into his own accounts. He was never convicted but was forced out of the ruling party and eventually ran to succeed Obasanjo on an opposition ticket.


48 See Davidson Iriekpen, Yar’Adua and EFCC – between rule of law and populism, This Day, 14 August 2007

49 Ibid.

50 In 2007, the office of the Attorney General and the EFCC engaged in a public dispute over which office should preside over Kalu’s trial. Both appeared at Kalu’s federal trial claiming to be the rightful counsel of record. The Attorney General has the constitutional authority to take over prosecutions initiated by other offices, but the episode highlighted the growing tensions between the two bodies – and added fodder to suspicions that Yar’Adua was undermining the EFCC to protect his allies.


52 See Kanu and Oboh, Senate – sharpening EFCC’s teeth against corruption.


54 See Mo Shaik, Where have all the democrats gone? The case for dissolving the Scorpions, SA Crime Quarterly 24 (2008), 3–8, 6.

55 South African constitution, 199 (emphasis added).

56 Sections 209 and 210 of the constitution provide for the establishment and regulation of South Africa’s intelligence services.

57 Khampepe Commission of Inquiry into the Mandate and Location of the Directorate of Special Operations (‘The DSO’) (Khampepe Report), South Africa, 2006, paragraph 12.1: ‘The argument that the legal mandate of the DSO to investigate and prosecute serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit. It is clear from the reading of the constitutional judgment in the Minister of Defence v Potsane 2002 (1) SA 1 (CC), at p. 14, para 26 that the meaning of “single” used in the relevant section conveys no more than the fact that various police forces that used to form part of the “independent” homelands such as the Transkei, Bophuthatswana, Venda and Ciskei (“TBVC”) would be amalgamated into one single police force. The word “single” does not therefore connote “exclusive”’.

58 Ibid, paragraph 12.2 (‘The argument that the DSO is a police force within the meaning of section 199(1) of the constitution where it has the legislative competence to investigate and prosecute matters referred to in section 7 of the NPA Act is also without merit. It is evident that most regulatory authorities have the statutory powers to investigate non-compliance and violations relevant to their area. This, in itself, would not, in my view, qualify these regulatory structures to be police forces’).


60 Ibid, paragraph 12.5.


63 Ibid.
66 See Jeremy Gordin, *Zuma: a biography*, Cape Town: Jonathan Ball, 2008, 136 (describing Zuma’s understanding that ‘Mbeki was trying to neutralise him politically [and] had in fact politically castrated him pretty effectively’).
67 See, for example, Wyndham Hartley, DA offers options to pick Pikoli successor, *Business Day*, 19 February 2009.
68 South African Police Service Amendment Bill (B30–2008).
71 Zuma’s legal team acquired recorded conversations, captured by the National Intelligences Agency, of McCarthy and former NDPP Bulelani Ngcuka discussing the Zuma charges. Mpshe found that the conversations suggested political bias on McCarthy’s part. While asserting that his decision did not amount to an acquittal, he stated that ‘legal process’ had been ‘tainted’ and it would have been ‘unfair as well as unjust to continue with the prosecution’: Mokotedi Mpshe, Why I decided to drop the Zuma charges, Statement by the National Director of Public Prosecutions on the matter *S v Zuma and others* (6 April 2009), http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=124273&sn=Detail (accessed 26 September 2009).
Tusks and trinkets: An overview of illicit ivory trafficking in Africa

Anita Gossmann

Introduction

By 1989, ivory poaching had reached epidemic proportions in Africa, prompting an all-out, global ban on the ivory trade. Despite a dip in illegal activity during the 1990s, there has been an increase in illegal ivory trafficking on the continent in recent years.

Over the last five to ten years, there has been a growing indication of a greater level of organisation and sophistication in the illegal trade in ivory. Growing numbers of seizures and greater quantities of illegal ivory found during these seizures are considered by many to be indicative of a rise in illegal ivory poaching and trafficking in Africa.

Keywords: ivory, poaching, trafficking, organised crime, Africa, conflict
The overall rise and sophistication in the trade is accounted for by a growing demand for ivory in East Asia following extensive economic development in the East during the 1990s. This demand has been accompanied by a growing East Asian presence in Africa in terms of investment and development projects. The rise in demand and access has further been assisted by poorly regulated domestic ivory markets, porous borders, and limited local law enforcement capability.

Evidence suggests organised poaching is occurring in various regions, but with a notable rise in Central Africa and the Congo basin. Transit routes and countries also vary, with poached ivory often criss-crossing several land borders before exiting the continent, usually by sea. End markets are overwhelmingly concentrated in Asia and especially China.

Beyond mere criminal enterprise, organised ivory trafficking is also associated with armed conflict. Conflict on the continent has traditionally provided cover and opportunity for illegal poaching. However, ivory is also being used as a means to fund war and purchase weapons and supplies for armed fighting groups in several ongoing conflicts.

Unlike other illegal trades taking advantage of Africa’s porous borders and limited law enforcement, organised ivory trafficking has an added urgency in that elephants and hippos across the continent are being killed in the process. According to Traffic’s Tom Milliken, ‘Central Africa is currently haemorrhaging ivory’.

**Africa and the international illegal ivory trade**

**A market-driven trade**

With 85 per cent of the world’s wild elephants located in Africa, the continent plays a key role in the supply of ivory to both domestic and international markets. Most of this supply is from illegal and unsustainable sources.

Domestic and international markets are characterised by legal ivory-carving industries and markets. In most countries in Africa and abroad, ivory carving and the selling of worked ivory remains legal, albeit with some restrictions. Legal ivory carving is restricted to the use of existing stocks of ivory acquired prior to the 1989 ban. However, distinguishing between pre-1989 and recently poached ivory is near impossible.

Regulation of domestic ivory markets varies greatly, and the trade in illegal ivory is directly related to the presence of thriving ‘large-scale, poorly regulated domestic ivory markets in parts of Africa and Asia’. Further enabled by high levels of corruption and limited law enforcement capabilities, illicit ivory flows are effectively laundered through these poorly regulated but legal domestic markets.
With pre-ban ivory stocks believed to be running low, if not long since expired in China, the need for ivory supplies to meet a growing demand is essentially driving organised poaching in Africa.

**African markets**

From domestic markets in Africa, worked ivory is bought by tourists, aid workers and business travellers. Meeting consumer demand, ivory pieces include jewellery, souvenir pieces, figurines, chopsticks and name seals – favourites with Asian buyers. Costs usually range between US$20 to US$200. While ivory is expensive in most African markets, prices are cheap compared to markets in Asia.

Poorly regulated markets persist despite the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which prohibits the sale of ivory in unregulated domestic markets. Although CITES has been endeavouring to tackle the matter of unregulated markets since 2003, efforts have so far been unsuccessful. Such local, legal markets are easily exploited by foreign nationals looking to ship ivory out of the continent.

Contraband ivory from the Democratic Republic of Congo (DRC), Central African Republic (CAR), Chad and Southern Sudan, for example, supply the Sudanese market. Centred in Khartoum and Omdurman, the market is one of the largest and most poorly regulated in Africa. It is considered to play a major role in the illegal trade and is a hub for the shipment of ivory to China. Similarly, despite a government crackdown in 2005, the Ethiopian market is seeing a resurgence with ivory coming primarily via Sudan and Kenya.

Some countries, however, remain beyond the realm of CITES, for instance Angola. Having not signed the convention, Angola has become a hub for the sale of illegal ivory. In the last field assessment by Traffic in 2006, researchers noted enough ivory in local craft markets in Luanda to reflect the death of at least 250 elephants. Given that Angola was believed to only have 246 elephants at the time, worked ivory found in Luanda was believed to be primarily of DRC origin, with the majority of vendors also being DRC nationals. Angola is further suspected to be a major conduit for raw ivory being trafficked from the DRC to China and Vietnam.

**Asian markets**

Much of the illegal ivory trafficked from Africa supplies legal and illegal markets and industries in Asia. Both China and Japan, for example, have longstanding domestic and legal ivory-carving industries. While Japan traditionally dominated the global demand for illicit ivory, China has surpassed the former since the late 1990s and is now the world’s largest market for trafficked ivory. Large volumes of illicit ivory enter China
either directly or via ports in Hong Kong, Macao and Taiwan. Other major markets and transit countries include Thailand, Singapore, the Philippines, Malaysia and Vietnam.\textsuperscript{16} All are considered to play key roles in the trafficking of ivory and represent to varying degrees both transit and end-user markets.\textsuperscript{17}

Prices in these markets for illegal ivory vary but are known to have fetched around US$850 per kilogram in China and Japan in 2007 (from US$200 in 2004) and, according to some estimates, up to US$1 700 per kilogram by 2009. In Vietnam, considered to be one of the most expensive markets for ivory, retail first prices currently stand around US$1 500 and US$1 800 per kilogram.\textsuperscript{18} Wholesale prices are estimated to be between US$750 and US$1 200 per kilogram.\textsuperscript{19} These are near triple of that in 2001 and 2002.\textsuperscript{20} In turn, business travellers to Africa from Asia can purchase ivory for about US$200 per kilogram in Africa and then sell it for US$2 000 after carrying it home to Asia in a suitcase.\textsuperscript{21}

**Demand meets opportunity**

*Asia meets Africa*

Despite the 1989 ban, the volume of ivory being seized is on the rise. According to Traffic, large-scale seizures (of one ton or more) increased from 17 between 1989 and 1997 to 32 between 1998 and 2006 alone.\textsuperscript{22} Rising quantities are attributed to a growing demand for ivory in Japan, Thailand, Vietnam, Taiwan and especially China. Raw ivory is used for furnishings, decorative crafts, jewellery and traditional name seals, or *hankos*, in Japan.\textsuperscript{23}

This demand for ivory was spurred on by the rapid economic development experienced in the East during the 1990s, and the rising affluence of peoples in the region. This economic boom has further been accompanied by a growing Asian presence across Africa in terms of Asian business investments and development projects on the continent. These projects include construction, road-building, timber, mining, or oil exploitation projects, many of which commonly occur in proximity to sources of ivory.\textsuperscript{24} In Sudan, for example, some 75 per cent of ivory is bought by Chinese customers, followed by South Koreans, many of whom are working in the oil, mining and construction industries.\textsuperscript{25}

The greater role of transnational criminal syndicates in the ivory trade coincided with the increase of foreign nationals from end-user markets in Africa, namely Asian foreign nationals.\textsuperscript{26} A greater Asian presence on the ground in Africa has afforded opportunities for criminal links to be established and capabilities developed to move large consignments of raw and worked ivory to Asian markets.

In comparison, ten years ago non-Africans were involved in poaching on the continent, but more opportunistic poaching. Today Chinese nationals are behind all of the recent
rings identified in South Africa, Zimbabwe, Zambia, Malawi, Tanzania and Kenya and have been shown to be important players in Sudan. According to the most recent Elephant Trade Information System (ETIS) data, Chinese nationals were arrested, detained or absconded in at least 126 significant ivory seizures (accounting for some 14,2 tons) in 22 African range states between 1998 and 2006 alone.

By far the most telling in terms of the extent and degree of organised criminal activity involved was the 2002 Singapore seizure. In June 2002, 6,2 tons of illegal ivory was seized from a cargo ship in Singapore following a tip-off to local authorities. A container on the ship, which sailed from Durban, was found to be carrying six wooden crates from a company in Lilongwe, Malawi, containing 532 elephant tusks and more than 40 000 blank ivory *hankos*. Given that one ton of ivory is representative of approximately 100 elephants, the seizure is believed to have accounted for the death of some 600 elephants.

Problematically, ivory seizures are overwhelmingly only made following tip-offs to customs officials, and it is estimated that as little as 10 per cent of overall contraband is in fact confiscated. Moreover, most seizures occur while the ivory is in transit, rather than at its final destination. After investigation, the Singapore shipment was deemed to be only one of at least 19 ivory shipments by the same syndicate. Of the 19, 15 had been destined for Singapore, with Japan often the final destination. The remaining four containers were set for Guangzhou, China, the heart of China’s ivory industry. Given that some of the crates confiscated contained 40 000 *hankos* and were labelled Yokohama, the shipment is believed to have been heading for Japan.

Similarly, in a May 2006 seizure in Hong Kong, one shipping container was found to contain nearly four tons of contraband ivory after arriving in port from Cameroon. Authorities later uncovered a further two containers, one of which still had traces of ivory, and analysis of shipping records showed that the Taiwanese man responsible had previously shipped 15 containers along the same route. Although there is no way of knowing whether these containers were used to move illegal ivory for certain, the 15 were estimated to have had the capacity to hold some 40 tons (from 4 000 elephants) of illegal ivory.

Two months later, on 3 July, a shipment was confiscated in Kaohsiung Harbour, Taipei. Two containers were found to have 744 tusks (3,06 tons) and 350 tusks (2,1 tons), respectively. Shipping documents showed that both containers had sailed from Tanga, in Tanzania, and were en route to Manila. One month later, in August, a further 2,8 tons were seized in Osaka. Many of the tusks were marked with Swahili lettering, suggesting that the shipment also originated in East Africa.

More recently, in 2009, large-scale seizures included more than a ton of ivory confiscated in Thailand in January. The shipment was traced back to Uganda. In March, 6,2 tons
was seized at the Hai Phong port in Vietnam, and in May, three tons were seized in the Philippines. Both shipments were traced back to Tanzania, with the Hai Phong seizure having come via Malaysia.

Importantly, these seizures suggest that shipments are organised and consistent rather than being once-off in nature. In addition to these large-volume seizures, smaller, more opportunistic seizures also occur all the time in both Africa and Asia.37

Moving a ton or more of ivory is no small endeavour, though. The ability to move such quantities is reflective of the level of organisation, scope, sophistication and financing involved in the current illicit trade. This, in turn, indicates the involvement of major criminal syndicates with established links in existing markets with the standing infrastructural and organisational capacity to absorb and process these volumes of ivory.38

It is problematic that this scope, sophistication and financing overwhelmingly exceed the capacity, infrastructure and resources of enforcement agencies in Africa.39 Those charged with protecting elephants are often without sufficient personnel, radios, water bottles, appropriate 4x4 vehicles, aerial support, communication systems, adequate weapons and ammunition.40

Moreover, corruption and collusion is high at all stages of the ivory trade, providing opportunity and protection for traffickers. Corruption is prevalent among members of enforcement agencies, government bureaucrats, military officials, economic elites, and customs officials.41 Government officials have even been known to pilfer from legally acquired government stocks and sell the ivory on the black market. In turn, the overall risk to traffickers is very low and especially relative to the high profits to be made. Ivory, like other wildlife-related crime, is generally considered a low priority among law enforcement agencies.42

CITES and ivory sales

Some conservationists argue that the demand for ivory has been further stimulated by CITES decisions to allow one-off sales of government ivory stocks, first to Japan in 1999, and then to China and Japan in late 2008.43 Moreover, members of CITES are driving towards legalising the ivory trade in the future.

Wildlife Conservation Society biologist and National Geographic Explorer-in-Residence Dr J Michael Fay has argued that poaching has intensified in southeastern Chad since 2005 due in part to the increased acceptability of and access to the global ivory trade – ‘the world thinks it is okay to buy ivory again’.44 Bill Clark, a game warden with the Israel Nature and Parks Authority and current chair of Interpol’s Wildlife Crime
Working Group, similarly argues that greater legalisation of the ivory trade will only serve to stimulate poaching and trafficking.\textsuperscript{45}

However, others maintain that the 1989 ban cut off the legal supply of ivory, ‘which was bad news for elephants’.\textsuperscript{46} In this, the ban has in fact stimulated illegal poaching and trafficking in ivory. According to Daniel Stiles, who has conducted extensive field research into global ivory markets, ‘[t]he CITES-approved sales are irrelevant to market demand’.\textsuperscript{47} Rather, a long-standing consumer demand, coupled with the economic means to purchase ivory, drives the market.

**Ivory crime: Ivory trafficking in Africa as a criminal enterprise**

**The mechanics of the illegal ivory trade in Africa**

Prior to 1999, a fairly diverse group of players were involved in ivory poaching and trafficking. These included indigenous hunters who would sell tusks to dealers in the cities; members of fighting forces who poached elephants and sold tusks to traders; professional bushmeat hunters who killed elephants opportunistically; professional hunters commissioned to acquire certain sized tusks; local villagers killing elephants after human/elephant confrontations and then selling the tusks; and corrupt wildlife officers selling off tusks from found or culled elephants.\textsuperscript{48}

Today, random opportunistic poaching by local individuals still occurs to some extent, as does killing due to increased human/elephant conflict as people encroach on elephant habitats. As in the past, these individuals then sell their ivory to local dealers for between US$20 and US$50 per kilogram depending on the size, quality and source of the ivory.\textsuperscript{49} The dealers then sell the ivory to local craftsmen and ivory workshops for processing. In Addis Ababa and Khartoum, prices can reach US$100 or US$150 per kilogram.\textsuperscript{50} Armed forces also engage in poaching and trafficking. With access to arms and transport, members of the Sudanese Army have been implicated in transporting ivory to and from Khartoum and Omdurman.\textsuperscript{51}

However, increasingly frequent large-scale seizures and recent DNA evidence collected from these seizures suggests that the role of organised crime in poaching operations has become far more prominent.\textsuperscript{52} A purchase order for a specific quantity of ivory is believed to be received. Locally based dealers hire contractors to poach the required number of elephants and organise for the transport of the poached ivory to port.\textsuperscript{53} Dealers of Asian origin (largely Chinese or Korean) commonly work in one country and organise for ivory to be poached in another country. For example, in one case a man of East Asian origin ran an export business in Cameroon, but used the business as
a cover for exporting contraband ivory poached in the region along the Gabon/Congo-
Brazzaville border. These dealers are further assisted by corrupt rangers and police who
facilitate operations.

Contractors then organise teams of poachers to kill a particular number of elephants in
a specific area. The actual poaching is carried out by youths who are recruited and led
into the bush by experienced poachers who have a direct link to dealers of both ivory
and illegal weapons which are needed for poaching. In turn, contractors are known
to provide arms to the poachers for specific operations. These more experienced
poachers usually also engage in other crime such as cattle rustling, banditry and weapons
smuggling.

Poachers are usually well armed and poaching operations are conducted using mostly
assault rifles, including AK-47s, M16s and G3s. In addition to rifles, poisoned arrows
are also used, especially in Kenya. Poachers in Kenya are believed to be using poison
from the acocanthera shrub.

DNA evidence suggests that elephant populations within a restricted geographic location
are targeted to meet the needs of a planned shipment. Rather than being poached and
collected from various locations, the ivory has been found to come from very closely
related elephants. Analysis of the Singapore seizure found that the ivory originated from
savannah elephants across a narrow stretch of Southern Africa, centreing on Zambia.
Analysis of the 2006 Hong Kong seizure found that the poached ivory that had sailed from
Cameroon came from forest elephants native to a restricted area in southern Gabon, near
the eastern border with Congo-Brazzaville. More recently, ivory from the 2006 Taipei
seizure was found to have come from elephants in a relatively small area traversing the
Selous Game Reserve, in Tanzania, and the Niassa Game Reserve, in Mozambique. This
further matched 390 tusks and 121 cut pieces (2.6 tons) seized by Hong Kong authorities
five days after the Taipei seizure in Sai Ying Pun, in July 2006.

Once poached, ivory is disguised and largely transported by land, often crossing several
borders before reaching a seaport. This way, ivory is exported from a country other than
its origin. For example, the ivory seized in Singapore in 2002 is known to have been
poached in Zambia, then smuggled across the border from Chipata into Malawi by road
and driven down to Lilongwe. In an ivory factory in Kawale district, the poached ivory
was inventoried, packed and stowed inside a container. The container was then driven
down to Durban, presumably crossing into Mozambique and then South Africa.
Although large shipments make use of regular trucks, logging trucks, and 4x4s, smaller
amounts are also moved by motorcycle from less accessible areas to trading centres.

Once at port, the ivory is disguised and hidden within shipping containers using various
methods. In the 2006 Hong Kong seizure, one shipping container was found to have
false compartments filled with ivory. The means by which the compartments had been packed and skilfully constructed suggested a thorough metallurgical knowledge, but also supports that traders ‘know in advance that they have space (and shipping budget) for specific amounts of ivory’.

Once loaded, contents are then declared to be anything from timber planks to used tyres to stone sculptures to plastic waste to sisal fibre. Importantly, syndicates will commonly move ivory via multiple shipments so as to reduce risk of confiscation.

Air transport is also used, but largely involves smaller amounts ranging from three or four kilograms to several hundred kilograms. In such cases, raw ivory is usually cut up into smaller pieces, wrapped up and smuggled out by air.

Although poaching occurs all year round to some extent, large-scale poaching primarily occurs seasonally, most commonly during rainy seasons. Not only is water more readily available for poachers to drink, but in many parts of Africa, bad roads are rendered impassable as a result of the rain and rangers are unable to access all areas of a reserve. Ivory is then often hidden and later collected during the dry season when it is possible to move the load by road. Conversely, in West Africa, poaching usually occurs during the dry season or la saison serre when ‘there are fewer and fewer water points as the dry season progresses, and the elephants are forced to drink at fewer places, where the poachers set their ambushes’.

Sources and routes of illicit ivory in Africa

The countries affected by poaching most notably (but not exclusively) include: Zambia, Malawi, Zimbabwe, Tanzania, Kenya, Mozambique, Nigeria, Cameroon, Mali, Sudan, Chad, the DRC and CAR. Overall, poaching is traditionally best associated with states exhibiting low levels of law enforcement and high levels of corruption, conflict, political instability, and access to small arms.

Although Southern African states have had some success in terms of maintaining elephant populations and in improving law enforcement capability, capacity remains limited to poor in Central, West and parts of East Africa. Unlike most Southern and East African states, Congo Basin countries, for example, overwhelmingly have crumbling infrastructure and poorly supported wildlife departments. Regardless, evidence suggests that not only does poaching still occur in Southern Africa, but that these states still act as transit countries for trafficking illegal ivory.

Historical trafficking routes used prior to the 1989 ban continue to be used to move ivory to port. In addition, new construction and development projects are providing greater access to elephants, as well as building the infrastructure that allows for ivory to
be transported out of the range area. New logging, road-building and road rehabilitation projects in the Congo Basin are creating highways of death for forest elephants. Recent studies have shown that elephant poaching has escalated in the region, and particularly in proximity to roads and other infrastructure projects, with no elephant carcasses being discovered further than 45 kilometres from the nearest road. According to WWF, forest elephants in Cameroon, CAR, Congo-Brazzaville, Gabon and the DRC could be extinct within ten years if current poaching levels persist.

The DRC is considered to be one of the primary sources of illegal ivory for both African and international markets at present, and ‘the most important source of ivory found in West African and Sudanese ivory markets’. In turn, the country’s elephant population is estimated to have fallen by a third in the last five years. Although there have been no recent field studies, an active domestic market in Kinshasa was reported in the last ten years.

Worked and raw ivory is believed to be moving from the DRC to Luanda, Kampala, Khartoum, Omdurman, Douala, Kenya and Tanzania, from where ivory is then shipped to the East. Recently, in May 2009, 100 pieces (35 kilograms) of ivory were intercepted between Masaka and Kampala on a bus en route from the DRC. The bus reportedly entered the country at the Bwera border crossing, along the DRC/Uganda border, with ivory hidden among sacks of bananas. From Khartoum and Omdurman, raw ivory also moves north by land to Cairo, Luxor and Aswan.

Both Nigeria and Cameroon have large domestic ivory markets and carving industries, and play an important role as transit hubs for ivory moving from Africa to Asian markets. Douala has traditionally acted as a collection site for raw ivory from Central Africa, including CAR, Congo-Brazzaville and Gabon. From the country’s southeastern region, poaching is commissioned by a variety of middlemen, including government officials, and the ivory is then transported by land, usually in timber trucks and fuel tankers. Cameroon’s Lobeke National Park and CAR’s Dzanga-Ndoki National Park are considered hotspots for poaching in the region. Large movements of ivory simultaneously occur from Cameroon to Nigerian ports.

Poaching in Kenya and Tanzania is of growing concern. Although some Kenyan ivory still moves to Ethiopian (usually via Madera and Moyale) and Sudanese markets, ivory primarily moves towards local seaports (commonly Mombasa and those of Tanzania). Poaching has increased by over 60 per cent in Kenya between 2007 and 2009. In April 2009, a Kenyan and Tanzanian were apprehended in Kenya just 50 kilometres north of the Tanzanian border. They were caught driving a car with 512 kilograms of tusks. In July, Kenyan authorities seized a further 16 elephant tusks (280 kilograms) on board a cargo flight in Nairobi’s Jomo Kenyatta Airport. The plane had flown in from Maputo and was destined for Thailand and then Laos. Officials noted that blood on the tusks
indicated that the elephants had been poached recently. Incidents have been especially high in the Amboseli and Tsavo National Parks, both situated along the country’s southern border with Tanzania.

Zambia, Malawi and Zimbabwe have been the predominant suppliers of illicit ivory in recent years in Southern Africa, with ivory moving via Malawi, Mozambique and Zambia to Tanzania or South Africa. The triangle formed by the Selous Game Reserve in Tanzania, the Luangwa Valley in Zambia, and the Niassa Game Reserve in northern Mozambique is considered a hotspot for poaching in the region, with the ivory moving usually via Tanzania or Mozambique to the East.

Bloody ivory: Ivory trafficking and armed conflict in Africa

Elephant populations vary across the continent. While the savannah elephant populations in Southern and East African states are larger and more steady, forest elephants in Central and West Africa are experiencing a severe decline in numbers. Areas where this decline is most notable correlate with armed conflicts in or across porous borders of weak states.

The relation between conflict and ivory trafficking in Africa is longstanding and has been prominent for a number of years. Traditionally, conflict has enabled the trade and provided criminally motivated poachers with greater access to elephants as protection provided by sanctuaries is compromised. Rebel groups and militias often use reserves and other wildlife habitats as safe havens and live off the land, hunting wildlife as a means of sustenance. Refugees fleeing conflict zones are also frequently implicated in opportunistic poaching.

However, the origin and conditions under which ivory is acquired are difficult to determine and require sophisticated DNA analysis. Given the international demand and the organised infrastructure available to satisfy this demand, ivory also offers fighting forces an accessible, lootable source of income to aid in sustaining operations, feeding troops, and purchasing weapons and supplies. In these cases, militia structures and military units are used to conduct poaching.

The Democratic Republic of Congo

Consignments of raw ivory are known to be moving out of conflict areas in the northern and eastern regions of the DRC. In addition to soldiers and militia fighters poaching elephants for their tusks, overall insecurity in the northern and eastern regions impede anti-poaching efforts.
In Garamba National Park, in the northeastern DRC, elephant numbers have been reduced from some 12 000 to less than half that number. Poaching occurs primarily during the rainy season between June and September, when elephants leave the park and go into the forest area where it is easier to hunt them. This ivory is then moved (usually by motorcycle) via Aba on the Sudanese border and Ariwara, on Uganda’s border, to seaports in Kenya and Tanzania.

Since the beginning of 2009, the Congolese military (Forces Armées de la République Démocratique du Congo, or FARC) have deployed inside Garamba following an offensive against the Ugandan rebel group the Lord’s Resistance Army (LRA), who had taken refuge in the park. However, whenever FARC have deployed to Garamba, so soldiers have turned to poaching. According to the park manager, Luis Arranz, ‘we know that they [FARC] are killing elephants to sell the ivory ... Once they came to help the rangers fight against the poachers and they became poachers ... Now they have come to fight the LRA but what they do is poaching.’

Since the FARC deployment, some 180 tusks are known to have passed through Ariwara alone. However, exact numbers of elephant deaths remain unknown as large areas within the park are inaccessible to rangers due to insecurity in the area – ‘there are zones in the park where the rangers can’t go’. LRA rebels have also launched attacks on ranger facilities, and in one incident attacked park headquarters, killing 16 people and burning equipment and infrastructure.

Similarly, in Virunga National Park, in the eastern DRC, militias and FARC are known to poach elephants and hippos. Between January and August 2008, poachers reportedly killed a fifth of the park’s elephants, believed to number between 200 and 300. Militias involved include the Mai Mai and the Front Démocratique pour la Libération du Rwanda (FDLR), consisting of the former Rwandan Hutu Interahamwe. As in Garamba, fighting between warring factions renders large parts of the park unprotected allowing for opportunistic poaching in areas otherwise inaccessible to rangers. In any event, in many cases it is the military or militias based in the park that carry out systematic, widespread poaching for meat to eat and sell, and for ivory. According to Robert Muir, DRC project leader for the Frankfurt Zoological Society:

There was one very dramatic case towards the end of 2006 when the FDLR wanted to support the Congolese military in their efforts to oust the CNDP from Sake ... The FDLR needed rations so that they could send their soldiers south and requested support from the Mai Mai, based at Cyondo on the southern shores of Lake Edward. For four days and nights, the Mai Mai, in motorised fishing boats, slaughtered the largest remaining pod of hippos – hundreds, quite literally turning the waters red. The meat was given to the FDLR, the ivory apparently to the north and then out through Uganda.
Some 400 hippos are believed to have been killed in the incident. Most poaching in the park occurs sporadically and is conducted using assault rifles, primarily AK-47s and occasionally heavy weaponry. Ivory is then collected and moved by land or boat via Uganda.

Chad/Sudan

In Zakouma National Park, southeastern Chad, Janjaweed militiamen are conducting long-distance raids into the park and surrounding areas. The Janjaweed are a militia active in the Darfur region of Sudan, an area which lies along the Chad/Sudan border near to the park. The area and the elephants which inhabit the region have long since been the target of marauding Arab horsemen and bandits, who have targeted elephants for their ivory. The Janjaweed, however, are selling the ivory on the Khartoum and Omdurman markets to fund their operations and purchase weapons. It has even been suggested that they have traded ivory directly for weapons with Chinese dealers, although this could not be confirmed. Regardless, funds sourced through the ivory trade are sustaining Janjaweed operations.

Almost 3 000 elephants in the park are known to have been lost since 2006, reducing the 3 800-strong elephant population of four to five years ago to a mere 800 today. Horse-mounted raids are most frequent in the rainy season between May and October, during which the elephants leave the relative sanctuary of the 3 100 square kilometre park and scatter across the 50 000 square kilometre Salamat region outside the park. The militiamen rarely target-shoot elephants but instead often open automatic weapons on grazing herds. As a result, numerous elephants, including calves and those without tusks, are killed. In 2007, more than 100 elephants were killed in a single attack by some 30 Janjaweed militiamen on horseback. The militia are also reported to have conducted raids into the northern DRC and CAR, and have ‘wiped out’ the elephants in eastern CAR.

Somalia/Kenya

Members of Somali militias have been conducting raids deep into remote protected areas in northern Kenya for some time. However, there has been a serious intensification within the past year and Somali raids are considered to be the primary source of poaching in Kenya today. Raids occur anywhere within 500 kilometres from the Somali border.

Poaching occurs all year round, but especially in the rainy season when elephants disperse widely and poaching parties are not restricted to passing via known water sources where ranger units frequently patrol. Those involved are commonly heavily armed and appear proficient in military-type skills such as small-unit tactics and infiltration. Poaching raids have been linked to known Somali warlords involved in narcotics and
weapons smuggling. Evidence further suggests that the militias rely on an established network of operators both within Kenya and Somalia. Poached ivory is then exchanged for firearms and supplies.121

Zimbabwe

Political and economic instability in Zimbabwe has seen ivory poaching rise along with the steady deterioration of anti-poaching capabilities.122 The impact on elephant populations over the last three to five years has been ‘disastrous’.123

Although poaching occurs all year round, levels are especially high between April and December during the hunting season. Poaching by impoverished rural people still occurs, however the military are most commonly involved. With access to the necessary weapons – mainly rifles – some sources estimate that the military are responsible for around 60–70 per cent of all poaching incidents in the country.124 Some corrupt National Parks officials have also been implicated, however, orders reportedly come from government level.125 It is also believed that ivory has been used as a form of currency by the Mugabe regime, including for repaying debts and purchasing weapons from China.126 In addition to recent elephant killings, ivory has also been trafficked from the government stockpile.127

Although poaching is reported from various areas in the country, incidents in Chizarira National Park and Hwange National Park continue to raise special concern.128 In Hwange, during the dry season, elephants are largely dependent on pumped water provided by the park at a number of boreholes. These boreholes are not always functioning, and in 2007 IFAW reported that this was part of a deliberate action to force elephants into areas where they can be more easily poached.129

Poached ivory usually moves via South Africa or directly to China by means of air shipments from Harare.130 In June 2009, for example, a Chinese national carrying 500 kilograms of ivory was apprehended on arrival in Beijing en route from Harare.131 If by land, ivory most commonly moves through Beit Bridge on the South African border. Alternatively, it transits Mozambique or Zambia to Tanzania. A popular route to Zambia includes the Chette Gorge on Lake Kariba.132

Conclusion

Legal trafficking?

An illegal trade has flourished around a legal demand for an illegal commodity. While the CITES secretariat may or may not be driving towards legal trade, most agree that
enforcement capabilities are just ‘not adequate at the moment’ for the trade to be partially or fully legalised. Much needs to be done to improve law enforcement capability and capacity-building to counter corruption and collusion within African range states.

Jason Bell-Leask, director of IFAW Southern Africa, argues further, however, that even with increased enforcement on the ground, the ivory trade is likely to remain difficult if not impossible to control, that ‘the value of this commodity is just too high to prevent poaching and illicit trade’. The recent string of seizures, including those in Thailand and Vietnam, in the wake of the one-off sale in 2008, would seem to support this. Instead of the sale flooding the market, lowering prices and putting traffickers out of business, increasing seizures of increasing amounts suggest that business is booming for organised criminals involved in the illegal trade.

Here efforts to better regulate the diamond trade may be instructive. Diamonds, like ivory, are a lucrative lootable resource found in many of the same locations as ivory (West Africa, the DRC, Angola, CAR, Zimbabwe, etc) and similarly give little to no indication of the conditions under which they are sourced, allowing for illicit flows to easily infiltrate the legal trade. However, efforts under the guise of the Kimberley Process to regulate the flow of illicit rough diamonds are now considered to be deeply flawed just six years after the introduction of the process in 2003. The trade in illicit rough is in fact ‘getting worse’. In countries where conflict and instability exist, or even in post-conflict regions where governance is weak, borders are porous and infrastructure fragile to non-existent, the process has been wracked by weak internal controls, limited political will and infrastructural incapacity. Worst of all, the process has provided a veil of legitimacy to illicit rough diamonds coming out of loosely controlled state diamond sectors characterised by corrupt and illegal practice. In this, the process is enabling illegally sourced or mined diamonds to be laundered through a certification system. Instead of curbing illicit flows, it legitimises these flows.

In turn, should the right infrastructural capacity and resources not be present at the time of a legalisation of the ivory trade, it is likely that organised poaching and trafficking will increase in Africa, and especially in those states that can least afford it. Like the diamond trade prior to the Kimberley Process, legal ivory markets are already being infiltrated if not supplied by illegal ivory flows. If the diamond trade is any indication of what could happen, then it is well possible that any legal system for ivory will become a conduit for illegal supply.

**Last word**

What is certain is that elephants are being killed at a pace unseen since the 1989 ban. Organised criminal, largely Asian syndicates are heavily involved in poaching and
trafficking to supply this stock and meet a mushrooming demand for ivory in parts of Asia. Armed conflict and instability in elephant range states not only make this supply possible, but the supply aids in making conflict possible.

Twenty years on from the 1989 ban on the ivory trade, evidence on the ground in China and Japan suggests that people are expecting more and more ivory. In the end, though, this is purely a vanity market; there’s no health, welfare or security-related use for ivory. Nobody needs ivory, they just want ivory. And it seems a flawed argument that elephants should be killed for their tusks so as to meet a want for trinkets, earrings and chopsticks.

**Notes**

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Madagascar’s political crisis: What options for the mediation process?
David Zounmenou

Gabon: Continuity in transition
Nadia Ahmadou
Madagascar’s political crisis:
What options for the mediation process?

David Zounmenou

President Marc Ravalomanana of Madagascar announced his resignation on 17 March 2009 and handed over power to a military directorate. However, very few believed that was the end of the power struggle between him and the then mayor of Antananarivo, Andry Rajoelina, who was promptly declared president. The subsequent political quagmire has become a serious challenge to regional and continental organisations battling to root out unconstitutional changes of regimes and consolidate their democratic doctrines. The situation has become even more complex with the successful auto-legitimisation of coup leaders in Mauritania and Niger.

Mediation efforts at the beginning of the crisis were undermined by confusion and a blatant lack of coherent leadership. No fewer than six mediators were dispatched

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to Madagascar, with little success. The initial intervention of the Southern African Development Community (SADC) proved ineffective and its radical approach undermined any attempt at a peaceful resolution of the crisis. Speculation about a military intervention to reinstate Ravalomanana heightened tensions and resulted in a hasty judicial process. He was sentenced in absentia to four years imprisonment and a US$70 million fine for abusing office, which will make it difficult for him to return to Madagascar.

This was the first time SADC has been confronted with an ‘unconstitutional change of regime’ and Madagascar is a testing ground for the regional body's mechanisms and protocols on democracy and good governance. The way SADC approaches the situation on the island will enhance or undermine its credibility in addressing similar political crises within the region. Although slightly after the event, SADC held an extraordinary summit in Sandton, South Africa, on 20 June to consider the political and security situation in Madagascar at which it produced a rescue package. Southern African heads of state and government appointed former Mozambican President, Joaquim Chissano, to lead the talks between Ravalomanana and Rajoelina, thus making political dialogue an essential element in addressing the problem.

The appointment of Chissano, a respected state elder, came barely a week after the African Union and the United Nations suspended their own mediation efforts, citing a lack of political will by the two parties as the reason. While the Chissano-led international contact group has drafted a so-called ‘charter for the transition’, highlighting the principles and the organs of the process, sharp disagreement persists on some sensitive issues, including an amnesty law for former presidents, positions in the government of national unity and other institutions such as those dealing with security and defence. A landmark consensus was reached in Maputo in August 2009 on the charter, but the mediation has remained vague on specific indications and directives to fill the various positions, leaving them to the desiderata of political actors. It is not surprising, then, that the mediation process has come to a standstill, and Rajoelina, as president of the High Authority of the Transition, refused to relinquish control over his position and that of the prime minister.

At least two major developments followed, with far-reaching implications for the mediation process. On the one hand, former arch enemies (Presidents Albert Zafy, Didier Ratsiraka and Ravalomanana) have joined forces against Rajoelina, even calling on the army to intervene. They all want Rajoelina to give up his position or his authority over the prime minister. On the other hand, concerns were raised within the Rajoelina camp about the motives of the opposition political forces, suggesting it was aimed at weakening him and even ousting him from power. Rajoelina also finds himself in a difficult position, for some of his supporters clearly oppose any decision to appoint a new prime minister. The decision by the army hierarchy not to intervene despite calls
for it from former President Albert Zafy could be interpreted as a move of tacit support for the current political dispensation. Furthermore, the complete lack of reaction to Didier Ratsiraka’s threat of protest highlights the weakness of his representation in the country’s political landscape. Malagasy people still remember his years in power and the abuses that compromised the democratisation process.

Indeed, Rajoelina runs the risk of losing the support of key political and military allies if he submits to the demands of the opposition. There is no doubt that his major support in the army comes from the Camp Capsat soldiers, who were responsible for the March mutiny that contributed to the downfall of Ravalomanana. Though some leaders of the movement are frequently accused of abuses and intimidation, they remain useful in terms of the young leader’s bargaining power. It is also clear that high-ranking military officers, including the defence minister, support the current prime minister, Monja Roindeo. Losing Roindefo would mean losing much-needed army support. Rajoelina’s political survival depends on the decision he has to make regarding his prime minister and other key appointments in the government of national unity, and it is therefore not surprising that he rejected the formula for the political transition suggested by the SADC mediators. On 8 September 2009 he reappointed Roindefo and members of a cabinet without Ravalomanana’s agreement, in sharp contradiction to the ‘Maputo spirit’.

One could argue that SADC’s mediation is losing its focus. While the major aim is to provide the leadership with a comprehensive formula for the return to constitutional order in Madagascar, it seems as if political actors are taking advantage of the process to promote partisan interests. There is little doubt that the strategy behind the opposition’s demand is to oust Rajoelina from power – a mini coup d’état in disguise. But if SADC mediators have an insight into the power dynamics among the key political actors, neither the position of head of the transition government nor that of prime minister should be contentious issues. Both wish to control the process, capturing the state in an act of political revenge. Ravalomanana has publicly declared that he would never legitimise Rajoelina’s regime.

The SADC mediation team needs to refocus the discussions on mechanisms for free and fair elections and consensual political arrangements that could end the cycle of political violence, as this is fast becoming one of the main avenues to power in Africa. The government of national unity should be seen as a short-term mechanism to restore democratic order and not a platform for a counter-coup. If viewed in this light, it becomes unnecessary for the three former presidents – Zafy, Ratsiraka and Ravalomanana – to insist on the top three positions within the government. Attention should be focused instead on preparing for elections and any other related initiatives that could pave the way for a legitimate political order. They could gain even better leverage by ensuring that elections are held and that they are free and fair, as a means of proving their popularity. This is the way to act, unless they want to use the power-sharing deal as a permanent
pact among the elites and one that ignores the voice of the citizens and their harsh living conditions. The power-sharing deal will not put an end to the crisis. It is not an act that will legitimise an unconstitutional regime. In the short term, potential sources of conflict remain, including constitutional reforms and the elections, and these are more important than positions within the transitional government, particularly since there is an agreement that all four protagonists will participate in the presidential race.

However, Madagascar’s problem goes beyond the electoral process. Although elections provide the opportunity for the country’s citizens to express or reconfirm their adherence to the democratic process, many challenges lie ahead, including the consolidation of economic development, a continued fight against corruption based on the separation of public and private business interests, the equitable distribution of resources and, above all, reinstating the confidence of the people in the state’s institutions and in its political leadership. If the political actors fail to reach consensus on these issues, Madagascar could remain unstable and deeply divided not only along political and ethnic lines, but also within the army. The continuation of the status quo could be a formidable source of instability for the region, too, and could perpetuate the cycle of political violence as a strategy for obtaining and maintaining power in Madagascar.

A successful negotiation could help pave the way for successful political transition, creating an opportunity for profound political reforms in Madagascar, based on democratic norms and institutions. This in itself is a powerful incentive for the lifting of sanctions and allowing foreign investments. But one should not exclude the possibility of a compromised transition, one that encourages constitutional amendments to allow Rajoelina to stand and most likely win the presidential elections in an attempt to ‘legitimise’ his rule. There are powerful geo-political forces and interests at play in his tough stance. Major foreign companies have streamed into the country in efforts to extract minerals such as oil, nickel, cobalt, coal, gold and uranium. This could make it even more difficult for external partners to keep up the pressure for substantial political and socio-economic transformation.
The last time Gabon had to manage a political transition after the death of a president was in 1967 when the then president and father of the country’s independence, Leon Mba, succumbed after a long illness. Superbly orchestrated by the Elysée Palace in Paris and executed by the very influential and legendary presidential adviser Foccart, the presidency was offered to a young and promising politician whose most important quality at the time was his loyalty to France. Promising prospects of oil exploitation led Paris to exercise a tight control over the ‘democratic stability’ of the country in the Gulf of Guinea. It was not unusual at that time that France used its leverage to control the appointment of ministers and the ‘election’ of presidents. Forty-two years down the line, supporters of Bongo praise the political stability and the economic prosperity of Gabon whereas his opponents point to the appalling discrepancies between the rich
and the poor in a country of just one million inhabitants and impressive oil wealth. In addition, it has always been contended that President Omar Bongo made use of this wealth to ‘buy off’ the opposition and ensure his re-election over the years by not very legitimate means.

The shock wave that hit the entire political class when President Bongo died in a private hospital in Barcelona last June led many commentators to speculate about a remake of the Togolese scenario in Libreville. In fact, there were allusions to a military-backed dynastic succession or a coup d’état to ensure the continuity of the regime. According to the Gabonese constitution, the transition would be in the hands of the president of the Senate. This post is held by Rose Rogombé, who was to be responsible for the organisation of elections to determine who the new president would be. Preliminary analysis suggested that the transition would operate in favour of the Bongo clan, as Mme Rogombé is a member of the ruling party, the Gabonese Democratic Party.

Things seem to have changed since Bongo’s presidency, however. It would seem as if his successor would not to be determined by an arrangement between the French and African old men’s networks. Instead, the initial stages of the transition were managed by a woman who, in direct contrast with the imperial style of her predecessor, managed to achieve an unexpected consensus on the rules for the presidential election which was held on 30 August 2009. Unfortunately, the respect of the rules was problematic, mainly in the period following the election, and the quick recognition of the result by France casts a shadow over the neutrality of the former colonial power in the election process.

As the country began to put in place the necessary mechanisms for the elections, tensions appeared to have been alleviated, mostly by notable developments of local and municipal electoral procedures and by making facilities available for nationals outside the country to vote. Furthermore Mme Rogombé had the necessary moral authority to allow those institutions required for the smooth running of the process to do their jobs. Her achievements as a neutral, impartial and just president reflect the promises made in her investiture speech in which she undertook to represent and reflect the will of the Gabonese people throughout her transitional regime.

A most compelling illustration of this was the decision to temporarily ‘retire’ Ali Ben Bongo from his ministerial portfolio in view of upcoming presidential campaign. There had been complaints about the access he had to information that would give his campaign an unfair advantage over the opposition. There were expectations that the trend of choosing a presidential candidate from the party in power, in a country that has more often than not favoured political actors from within government ranks, would continue, to the detriment of transparent democratic processes. However, Mme Rogombé effectively allayed these concerns and in a consensual manner that appealed to all and which ensured the transparency required for free and fair elections. As she noted
in her official statement in this regard, there was a need for all presidential candidates to campaign on an equal footing.

Unfortunately, the order did not last long, for political tensions began to emerge shortly after an election date was decided upon. Although the transitional government had managed to make some progress in ensuring the constitution was upheld after Bongo’s death, it seemed to be unable to present a politically unified front once the organisation of the elections began. The Gabonese Democratic Party was racked by in-fighting over which candidate should be the party’s presidential candidate. The Bongo clan wanted to protect its political and economic interests, which were highly dependent on the presidential successor, at all costs. This resulted in in-party manoeuvres to appoint Ali Ben Bongo, son of the deceased president and Minister of Defence at the time, to represent the party. Following a controversial appointment procedure, two high-level party members, namely Prime Minister Jean Eyedhe Ndong and the Minister of the Interior, Mba Obame, resigned from the party and the government, and joined the presidential race as independent candidates. The tensions continued up to the elections, with the three favourite candidates being Ali Ben Bongo, André Mba Obame and Pierre Mamboudou. Each enjoys significant support and it was impossible to predict the outcome for any of these candidates with any certainty.

The election itself took place in an atmosphere of relative calm. However, opposition groups and independent observation missions to the country, including one from the African Union, pointed out a number of irregularities. One of these concerned an inflated voter list of 813 000 registered voters. Given that Gabon has a total population of one million of whom most are under the age of 20, reservations about the plausibility of this figure are understandable. In addition, the number and distribution of stations appeared to favour Ali Ben Bongo – the number of stations in areas where he had popular support were disproportionately large compared to those where the opposition enjoyed support. Moreover, the signal of the TV station covering the campaign of Mba Obame was repeatedly interrupted during campaigning and the election. The government also attempted to prevent the withdrawal of five opposition candidates who rallied behind Mr Obame, claiming their withdrawal was not done within a reasonable time. In an admirable show of strength the constitutional court and transitional president stepped in to re-instate order and transparency within the process and rejected this claim on the basis of the electoral code and the constitution. Other irregularities concerned the delay in publishing the results and disagreements within the electoral commission itself over the presidential choice of Ali Ben Bongo.

Following publication of the results, dissatisfaction resulted in protests in Port-Gentil, the opposition stronghold and economic hub of the country. This discord is still continuing, and opposition remains vocal about its mistrust of the result and is encouraging the population to reject it. The African Union has dispatched a delegate to bring the parties
together to effect an end to the tensions. Internationally, the new president has been congratulated by most countries around the world and the protests are expected to fade away in view of this acceptance by regional and international heads of state.

The new president has begun a presidential tour across the continent. However, the outlook for Ali Ben Bongo is not completely rosy, for he has big shoes to fill. The party support that he enjoys is fairly limited and dependent on his ability to maintain the patrimonial networks which keep the political elite surviving and flourishing. He also faces economic challenges stemming from the global fluctuation in the prices of oil and timber, which are two of Gabon's primary revenue-earning commodities. This situation is complicated by the fact that the Bongo clan, led by his sister Pascalone, control these industries and remain in a position to exert pressure in the future to ensure the protection of their economic interests.

The local population of the country remains extremely dissatisfied about especially the wide gap between the rich and the poor, which could lead to an uprising. Regional factors cannot be excluded, especially political inertia in surrounding countries. As president, Ali Ben Bongo will also face challenges with regard to accommodating the different ethnic, economic and political networks in the country in a manner that maintains the political stability that had existed during the reign of Omar Bongo.

All these factors confirm that Gabon is in for some tough times both economically and politically for the next five years. The way in which these challenges are addressed will depend on Ali Ben Bongo’s leadership skills and the strategic alliances he manages to build.
Mass Atrocity Response Operations: An annotated planning framework
Michael C. Pryce

The impact of clawback clauses on human and peoples’ rights in Africa
Sandhiya Singh
Mass Atrocity Response Operations: an annotated planning framework

Michael C Pryce

Introduction

In early 2007 the Carr Center for Human Rights Policy at Harvard’s Kennedy School of Government joined the US Army’s Peacekeeping and Stability Operations Institute in a partnership dedicated to making a substantial contribution to the anti-genocide community. The focus of the partnership was simple: to bypass the endless and unproductive debates over ‘whether’ to intervene in a mass atrocity and concentrate instead on the question of ‘how’ such an intervention might work. The project centred its efforts on using the US military’s Joint Operations Planning and Execution System to develop a plan focused on intervention. By using an empirical planning process to find the middle ground between the anguished demand that governments ‘do something, 

Keywords: genocide, mass atrocity, military planning, will to intervene (W2I), responsibility to protect (R2P), prevention
anything – now’ and those within government who respond with the equally emotional ‘we can’t do anything – ever, because it’s just too hard’, the Mass Atrocity Response Operations (MARO) Project provides a viable way forward.

To develop such a prototype planning framework, the standard military planning paradigm was modified through the collective experience of a core planning group and combined with the latest academic research. Further modifications followed the introduction of the framework to various audiences ranging from military planners and senior leaders from the US and other nations to State Department experts, former ambassadors, UN officials and representatives from non-governmental organisations (NGOs). Two trial scenarios were used to test the structure of the framework and illustrate course of action development. Together, the annotated planning framework (APF) and scenarios help to answer the questions ‘What do we want to do?’ (mission analysis) and ‘How are we going to do it?’ (course of action development).

Success in this difficult mission depends on building the broadest possible consensus throughout the international community. This in turn depends on developing a common vocabulary and procedures that provide a point of entry for those outside traditional military and governmental decision-making circles. The MARO Project’s APF has the flexibility to be used as a template that can be shaped to fit the needs of a specific region. The concept and related documents have been shared with representatives of the United Nations with the goal of helping that organisation to develop a capacity to prevent mass atrocities from occurring. It can also be adapted by the African Union to realise a mass atrocity response capability designed and built by Africans, for Africans. This could be accomplished by working with various existing national peacekeeping centres within which the MARO products could be adapted for African planning systems.

The MARO planning framework can help decision-makers in any organisation to evaluate information about a potential mass atrocity and share their assessments, using a common lexicon and analytical framework to make coordinated decisions regarding action they could take now or later, separately or together. This decision cycle could establish universal priorities for evaluating the situation and concurrently set the criteria for the next round of the community’s ‘watch–decide–act’ cycle. Thus the community could stay abreast of the situation within the country by developing familiar, knowledgeable and trusted networks using a cumulative knowledge base that forms the basis of a continuous dialogue. The anti-genocide community could become more relevant to those who must write policy to prevent or intervene.

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<tr>
<th>Eight stages of genocide</th>
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<tr>
<td>Classification</td>
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<tr>
<td>Symbolisation</td>
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<tr>
<td>Dehumanisation</td>
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<td>Organisation</td>
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<td>Polarisation</td>
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<td>Preparation</td>
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<tr>
<td>Extermination</td>
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<td>Denial</td>
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in a mass atrocity, by understanding how the policymakers see these problems in language that is familiar and clear to them. It would also help policymakers and military planners understand how the problem looks to those leading NGOs and private sector organisations, pooling knowledge and making use of all eyes on the ground.

This kind of interagency communication and coordination, though vital to the success of a complex mission such as mass atrocity intervention, is notoriously difficult to achieve. Again, use of the MARO planning framework could facilitate that dialogue. Lessons in analysis and planning distilled from decades of military experience can be adapted to serve all agencies of government, allowing each to contribute its own expertise to the problem of mass atrocity prevention. Planning and forethought are required to achieve ‘across the spectrum’ coordination in an intervention. Reaction rather than coordination is typically the result when an intervention is improvised following a hasty decision to intervene in a mass atrocity in progress. As if this challenge were not enough, the following is even harder: what to do with the failed state once the killing has stopped? Without prior planning, the risk of significant post-intervention problems derailing the entire effort expands geometrically. The MARO Project offers the chance to address these problems before they arise in an environment that leaves little time for reflective thinking and detailed planning.

**Prevention or intervention?**

Generally the international community’s interest in a fragile state peaks as a result of the recognition that one party is preparing to launch actions that could lead to a mass atrocity. A state’s descent toward mass atrocity may be measured by the stages of genocide. These stages, although not always occurring in order, do provide a starting point for placing known events within a reasonably predictable framework. Though perpetrators typically work very hard to conceal their actions from foreign and sometimes domestic view, mass atrocities do not just happen: they are quite visible provided one knows where to look and what to look for.

For a comprehensive policy based on preventative diplomacy to be effective, moral imperative must drive the political will to prepare for physical intervention, even while acknowledging that this is the least desirable course of action. Without political will directing the development of a military force specifically trained, equipped and organised to conduct such a mission successfully, there can be no credible threat of military intervention. If, on the other hand, a military response to a mass atrocity was formed and ready, it could become the ‘teeth’ for effective preventative diplomacy. The intent here is to underscore how the interrelated elements of moral imperative, political will and capability are balanced within the context of diplomacy. Rather than turning a blind eye as a failing state descends toward mass atrocity, assertive prevention
becomes the overarching policy uniting the efforts of government, NGOs, multinational corporations, regional security organisations, and so forth on the broadest possible front to exert diplomatic pressure. Backing up this diplomatic pressure is the demonstrated will and capability to intervene physically if all else fails.

**How the framework works**

The annotated planning framework was written from the perspective of a geographic combatant command planning staff, which is the level within the US military at which strategic thought and guidance are translated into military action. It is where the original planning for such an operation would take place and also where significant coordination between different agencies of government occurs. In that light it is important to re-emphasise that while this document is military in origin, it is not solely a military planning tool. It was an accepted premise of the core planning group that any military action undertaken without a specific and obvious connection to an overarching diplomatic effort is a recipe for certain failure. These vital connections with larger diplomatic and economic issues are taken into consideration at the beginning of the mission analysis process, while establishing the facts and assumptions regarding the operation. In this way the APF is designed to acknowledge and integrate the views of others by allowing their perspectives to drive and colour the very onset of planning.

Perhaps the most important divergence from the standard military planning model is that the bright line between ‘enemy and friendly’ must be replaced with a categorisation reflecting the reality of this complex mission. The APF recognises four categories of actors in a potential intervention: perpetrators, victims, interveners and ‘others’. The last, seemingly ambiguous, category refers to a variable with perhaps the most power in the entire equation – the observers. These could be people in the subject country who are not part of the killing, those in neighbouring countries, members of the international community, the media, or the domestic population of the intervening nation(s). In the age of information they wield the greatest control over responses to a mass atrocity. These are the people who determine whether or not a mass atrocity is taking place, who is whom within the maelstrom, the ease with which an intervening force can stage or move within a region, and crucially, whether or not the intervention has been successful.

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<thead>
<tr>
<th>Perpetrators</th>
<th>Victims</th>
<th>Interveners</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identified as the dominant element controlling the environment and information</td>
<td>The subordinate element, unable to escape or present a message</td>
<td>Outsiders willing to impose an end to violence forcefully and reshape society</td>
<td>Not part of the killing; could be within the region or part of the international community, or the domestic population of the intervening nation(s), and so on</td>
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This category of ‘others’ might also encompass a potential international peacekeeping force under a specific mandate to maintain stability following the intervention and facilitate the transition to peaceful self-government by the indigenous society.

**Mission analysis**

The planning framework and scenarios together illustrate the entire planning process. Because the APF addresses the concept of intervention in a generic fashion it can only demonstrate the first half of the planning process (mission analysis) which answers the question: ‘What do we want to do?’ The scenarios take this generic process and pin it down to specific, though fictional, situations in order to illustrate the practical application of the mission analysis and answer the follow-on question: ‘How are we going to do it?’ Mission analysis proceeds more or less through the following steps: establishing facts and assumptions, mission parameters, critical variables, drivers of conflict analysis, tasks, end states, mission statement, commander’s intent, critical information requirements and commander’s planning guidance for course of action development.

**Facts**

As the first step in the planning process, facts generic to many mass atrocities have been identified and referenced based on Carr Center research with regard to the development of a typology of mass atrocities. Having this research available well before any planning effort is directed in response to a real-world scenario allows planners to better understand the complexities of a specific mission and illuminates pathways for further, more specific research, outlining materials they could use and experts they might contact. With such a ‘stepping stone’ approach to understanding how to plan to prevent or intervene in a mass atrocity, planners gain a better appreciation of such a mission and can move into the next step by making clearer assumptions.

**Assumptions**

Making assumptions is one the most critical steps in planning, and any assumption that proves false must immediately be considered against the risk a commander is willing to incur during the operation. Assumptions must be constantly validated and, as they become facts or are proven false or discarded, any changes required to the plan must be recognised and accounted for throughout the entire operation.

**Mission parameters and force structure**

The MARO Project alters the traditional mission analysis process at this point to formalise the connection between two distinct but inexorably linked strategies: prevention and
intervention. It is relatively new ground in the military to formally plan a preventative operation, but this concept is gaining traction. Prevention is obviously the preferred choice in dealing with a potential mass atrocity, but it is a much more difficult strategy to describe in generic planning terms than is intervention. (It is incidentally also impossible to prove success in this mission, since it might be argued that a mass atrocity that does not occur had never actually been imminent.) Because the whole concept of deterrence rests on capabilities, planning for intervention, at least to a certain extent, is also planning for prevention. It thus becomes very easy to blur the line between the two missions, and it was hoped that explicit recognition of the mission parameters at this point in the mission analysis would help to maintain clarity throughout future planning.

Another unique aspect of planning a mass atrocity response operation is the manner in which a planner must shape the potential intervention force. The following military organisation is proposed for either a preventative show of force or an actual intervention operation:

- **Immediate intervention force** – ready and prepared to enter the target country as the name suggests: immediately. This force would be highly mobile, with a large communications capability and specifically organised medical and law enforcement capabilities tailored to the specifics of the known mass atrocity site(s). Their primary objectives would be to stop the killing, protect the population, care for the wounded, examine the mass graves and hold those accused as perpetrators for law enforcement officials.

- **Sustainment and response force** – designed to protect the stabilisation assistance elements, ensure the overall security of the area, provide quick-response combat reinforcements and synchronise humanitarian support.

- **Stabilisation assistance force** – designed to support immediate and prioritised large-scale medical, sanitary and infrastructure requirements once the mass atrocity has ended.

Once the parameters of the operation (prevention or intervention) have been established, planning can move to the next step, aimed at broadening the planner’s awareness of the nation in question and opening the planning effort to other expert opinions.

### Twelve critical variables

Written annually, the joint operational environment is a document intended to help the planning community broaden its view of the environment within which the US is likely to employ force. A working draft of the 2007 edition yielded 12 elements of the environment that are most likely to impact military operations. The variables (listed in the side bar on the next page) are used to keep the planning logic flowing, while formally weaving that
thread of logical thought through important aspects of the situation on the ground, the region and events surrounding a crisis. They also help the planners to understand how to structure their own organisation, not only for the physical intervention, but for the transition from military control of security to civilian control and its associated short- and long-term ramifications for the region and the role of the country internationally.

Drivers of conflict analysis

In traditional mission analyses, once the facts and assumptions have been set, the next step is to consider the centre of gravity analysis. This analysis has two elements: one focuses on the enemy and the other on the friendly centre of gravity. The four-category approach of the framework requires a further cognitive shift to accommodate the increased complexity of this mission and still provide a vehicle for considering the crux of the conflict and its component parts. The Interagency Conflict Analytical framework, developed by the US Administration for International Development and used by the Department of State’s Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in their planning framework, addresses the challenge of resolving a multi-level, complex problem with many actors and more connections, using the following four-step process for diagnosing conflict:

- Context
- Core grievances and sources of social/institutional resilience
- Drivers of conflict and mitigating factors
- Windows of vulnerability and windows of opportunity

Clearly, this shift to an approach more receptive to ‘shades of gray’ is much more likely to arrive at a conclusion closer to the centre of the problem. Following this analysis of the problem from a broad interagency perspective, the APF takes the analysis one step further by combining the drivers of conflict analysis with a US Marine Corps planning process that is traditionally used to consider the concept of critical capabilities, requirements and vulnerabilities. In this process the focus is on what an actor is capable of doing, what is required for them to do this, and how those requirements open them to vulnerabilities that can be exploited by an opponent.

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<th>Twelve critical variables</th>
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<tr>
<td>Geography and physical environment</td>
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<tr>
<td>Nature and stability of critical actors</td>
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<tr>
<td>Sociological demographics</td>
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<td>Culture</td>
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<td>Regional and global relationships</td>
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<td>Military capabilities</td>
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<td>Information</td>
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<td>Technology</td>
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<td>External organisations</td>
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<tr>
<td>National will and will of critical actors</td>
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<tr>
<td>Time</td>
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<tr>
<td>Economics</td>
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Essays

The centre of gravity lens is useful not only for determining core strengths and weaknesses in the perpetrator, it can and should also be used to examine and understand the intervener’s centre of gravity or drivers of conflict. Omitting this self-analysis leaves the job half done and a significant amount of risk to the mission unevaluated. Completing this part of the mission analysis is imperative for understanding the heart of the problem and developing the next step, which is to outline the tasks forming the foundation of the mission statement.

Main operating tasks

Traditional military planning organises an operation into ‘phases’. The APf again deviates from tradition by adapting instead the 'stages' approach employed in the S/CRS essential task matrix, namely intervention, transformation and fostering sustainability. The tasks were thus categorised into their proper stages, and one additional level of planning detail was added to facilitate correct sequencing and prioritisation of tasks. These further subdivisions within each stage are:

- **Main tasks**, which are imperative to the mission during a particular stage. Main tasks demand the highest priority of supervision and resource application, and stand as the foundation for later tasks

- **Supporting operational tasks**, which flow directly from the main tasks and constitute the bulk of the ‘daily work’ of that particular stage. These tasks are normally divided by specialty

As the supporting operational tasks are concluded, the final sequence for the intervention and transformation stages is ‘setting conditions for the next stage’. These are the precursors for the main tasks of the next stage and serve to mark the changing situation as it moves toward greater stability.

At this point in the developing the annotated planning framework, the MARO core planning group took the opportunity to address a persistent problem that has long plagued planning staffs. Experience shows that if a particularly critical planning assumption proves false, there is a substantial risk to the related tasks and ultimately to the mission. This risk has in the past been countered by experienced staffs keeping constant watch on the assumptions and rapidly gauging their influence on the related tasks and support requirements throughout the plan. In the APf the main tasks from each stage have been linked to a specific assumption, in an effort to add a degree of risk calculation regarding the severity of the issue, should an identifiable task fail. Presumably this structure could be used to calculate that impact on subsequent tasks and probable ramifications on the next stage, which, though beyond the scope of the original MARO Project, stands as an open invitation for further exploration.
Identifying the end states

In actual planning it is best to focus first on writing down the intervener’s desired end state as it is usually the clearest to articulate. That will simplify the process and leave time to further develop the other actors’ end states, based on the results of this process and the greater detail that should become available as the situation develops. This is also a good place to doublecheck the results of the analysis thus far against the original guidance documents, such as those that first directed planning to begin, and whatever standing regional strategy or policy had been in effect before the planning started. It is possible that several of the original assumptions will need to be re-evaluated and priorities shifted as detailed information that is discovered during planning may replace generalities or eliminate knowledge gaps. It is crucial to have a clear and detailed understanding of the desired end state for the country and region in question following the intervention; such as being free of revenge killing and with positive social structures developed to prevent the mass atrocity from recurring.

State the mission

This is the most critical paragraph in the entire mission analysis: it lays out who is going to do this, what they intend to do, when they are going to do it, where they are going to do it and why this is going to happen. It consists of the main tasks that were categorised earlier in the process and sorts them into the five ‘w’s’. The mission statement is the foundation of all the further planning and establishes the guidance for course of action development.

Commander’s intent

The commander’s intent is a clear and concise expression of the purpose of the operation and the military end state. It provides focus to the staff and helps subordinate and supporting commanders take actions to achieve the military end state without further orders, even when operations do not unfold as planned. It also includes where the commander will accept risk during the operation.8

While it contains specific details, such as a precise operational purpose and a military end state, it must also be so expansive that the intent can be clearly understood even if the situation changes substantially. This will be particularly true in a mass atrocity, where the perpetrator and victim labels can be very swiftly exchanged and leave the intervening force in a difficult predicament. A well-written commander’s intent can explain to the members of the intervening force (and the ‘others’) what their role is during the intervention and what it will evolve into after the killing has ended. It will also become an important aspect of the information campaign by reflecting the need for intervention and reaffirming the
desire to help end the conditions that led to the mass atrocity. Finally, a commander’s intent written for a mass atrocity response operation must, by default, describe a significant amount of action taken by non-military agencies and non-governmental organisations. That requirement also turns the commander’s intent into an important nexus aligning all participating organisations’ separate planning processes.

**Commander’s critical information requirements**

The US Department of Defense defines a commander’s critical information requirement (CCIR) as information ‘critical to facilitating timely decision-making’. Because of the complexity of combining MARO’s four-category approach with the various levels of CCIRs, this part of the mission analysis was simplified by keeping to the traditional planning groups: strategic, political, economic, and military. The MARO Project has also proposed changes to the CCIRs that are a reflection of the unique demands that mass atrocity response operations place on information requirements, but these must themselves first be tested through a series of workshops and exercises.

**Conclusion of mission analysis and start of course of action development**

By the end of the first half of planning, everyone involved in planning understands the ‘who, what, when, where and why’ behind the intervention. This marks the end of the relatively unconstrained, imaginative half of planning, in which a multitude of potential outcomes can and should be considered. On entering the second half of the planning process, concrete realities take the place of intellectual constructs. This shift is necessary in order to answer the ‘How?’ question regarding the intervention, which is confined to the physical realities of time, space, distance, manpower, resources and budgets. In this step, organisational planners must prioritise the results from the mission analysis into a single document which will be repeatedly referred to in resolving the myriad compromises arising within the real world of moving people and things over great distances, with or without broad international approval or support. A clearly written planning guidance document will ease the transition into these limited planning parameters and help keep the planning effort on the rails.

The publication *Joint operation planning* has an extensive, checklist-like definition of what the commander’s planning guidance should contain:

As a minimum, the planning guidance should include the mission statement, assumptions, operational limitations, a discussion of the national strategic end state, termination criteria, military objectives, and the Commander’s initial thoughts on desired and undesired effects. The planning guidance
should also address the role of agencies and multinational partners in the pending operation and any related special considerations as required. The MARO Project starts with the final sentence of this paragraph, placing those ‘agencies and multinational partners’ at the forefront of the planning effort where their ‘special considerations’ can inform the core of planning priorities and ensure that the operation represents a unified effort from its conception. Naturally, broadening the base of planning beyond the military model brings with it complexities that will have to be accommodated within the traditional operational planning process. This is precisely the rationale for promoting the MARO planning framework far beyond the Department of Defense and the United States. Non-military participants who nevertheless understand the military planning process are in the best position to have their agendas and concerns addressed within that process. Ideally, they will be able to enter the process seamlessly at the point where they can be most useful, articulate their contributions in a manner that can be assimilated most easily, and then coordinate their own actions throughout the operation with the overall effort, thereby reducing substantially the risk of having the entire operation blindsided by an otherwise predictable obstruction. Because of its broad moral appeal, the mission of mass atrocity intervention provides an ideal test case to spearhead this kind of interagency and multinational planning effort.

**Course of action development**

Though the process can vary, course of action planning basically follows a four-step progression: development, war gaming, comparison, and recommendation/selection. The first step involves developing several (at least three) options which are capable of accomplishing the mission, feasible with the resources available and unmistakably different from each other. War gaming then takes each of these courses of action and attempts to predict how each category of actors might respond to a specific action. There are numerous ways of accomplishing this, but all basically adhere to the concept of action-reaction-counteraction. At the end of the war gaming step planners have a reasonable expectation of how much each course of action will demand in terms of resources and the degree of risk each entails. Next, the courses of action are compared in a side-by-side analysis to the most important elements of the commander’s guidance. By the final step the advantages and disadvantages of each course of action will have been logically sketched out for the decision-makers, thus giving them the best practical options for conducting the operation.

For the purposes of illustrating this process the MARO Project proposes the following generic courses of action for intervention: safe havens, separation and saturation. (Though these courses of action represent a wide range of possible responses, as generic courses of action suitable for a generic planning framework, they are not intended to
cover all possible contingencies.) In examining these courses of action, it becomes obvious that each one builds on the previous by increasing the degree of commitment by the intervening coalition. In fact, depending on the scenario, one could nearly forecast the probability of a mission creeping from safe havens on the periphery to total occupation (saturation) of a country. The odds of losing control of the intervention and moving from one end of the commitment spectrum to the other are high. The intervention force has to ask itself: how much of the problem are we willing to own? To answer that question, planners must evaluate each course of action in terms of decisiveness, sustainability and risk. The selected courses of action should be nested within these overarching themes:

- Mitigate risk to the force and mission
- Save as many people from mass atrocity as possible
- Address the underlying causes of the atrocity as directly as possible
- Provide all possible support to agents of reconciliation and justice

Once coalition leadership has narrowed its options for action to prevent a mass atrocity, the primary effort, led by diplomats, can confidently focus on how to combine the military capacity to intervene with the determination to resolve the situation without bloodshed if possible.

**Conclusion**

By using proven planning and operational processes to address a mission that has been ignored in the past, the MARO Project has taken a first step toward stopping mass atrocities. More than that, it has opened a door to a larger opportunity, that of beginning a true dialogue that includes various governments, their government agencies, the military, private sector and NGOs. The MARO Project brings a practical perspective to what can be a polarising, emotional argument. Intervening in a mass atrocity may be costly in terms of money and lives, but by thinking about the problem within a regimented planning framework, the considered difficulties of intervention become the evidence to strengthen arguments for prevention that previously were anchored in emotion, not reason. Considering the challenge from the perspective of *how* rather than *whether* to intervene makes viable the conviction that prevention and intervention can become realistic policy options for governments around the world. Unfortunately, no such policy options currently exist. If we do not do something about developing the capability to intervene in mass atrocity, we will likely stumble into a problem we cannot hope to resolve with the tools that are currently available to us. Recognising that risk
and the related paucity of planning on the subject of intervention, the MARO Project reconsiders the problem using the traditional strength of the military in planning complex missions.

None of this negates the very real and complex problems confronting a planning staff directed to write a plan for this mission. Much work beyond a planning framework and a couple of scenarios must be done to truly understand how to intervene and stop a mass atrocity. All of these issues and more will need further thought and study, and the cause of mass atrocity prevention can only be strengthened by bringing to bear the expertise and dedication of as broad and diverse a group as possible to its challenges. The MARO Project’s focus on inclusion has been a driving force since its inception. Ultimately, it is our hope that all major regional security organisations such as the African Union and NATO will embrace the concept.

Notes
2 The economic element of that coercive power is beyond the scope of this article and outside that of the project as well, but the need for such tools to answer this challenge is as evident as the need for a viable military capacity.
5 Ibid, 4–5.
The impact of clawback clauses on human and peoples’ rights in Africa

Sandhiya Singh

Introduction

The adoption of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (the Protocol)¹ was a significant initiative in the promotion of African regional human rights. This development, while signalling the intention to deal with human rights violations through a judicial process, acknowledged the failure of the African Commission on Human and Peoples’ Rights (the Commission) to impact meaningfully on the development and maintenance of human rights in Africa. The failure arises from, inter alia, political horse trading² and its resultant disregard of human rights. In the words of Jean-Paul Masseron, ‘[t]he leading statesmen of Africa have a tendency to sacrifice individual liberties in order to safeguard national independence’.³

Keywords African court, clawback clauses
The function of the African Court on Human and Peoples’ Rights (the Court) in the maintenance and development of human rights was to be achieved by complementing and reinforcing the functions and protective mandate of the African Commission. The adoption of the Protocol was followed by the formation of the African Union, a supranational structure similar to the European Union, and was necessitated by increasing globalisation and the disenchantment expressed by African people with the political, economic and social choices exercised by their respective governments. The Constitutive Act of the African Union provides for the establishment of a ‘Court of Justice of the Union’. In July 2008, the African Union decided to merge the African Court on Human and Peoples’ Rights with the African Court of Justice in order to streamline the regional judicial system.

Despite the optimism that surrounds these developments, there remains the danger that the political horse trading previously alluded to may result in the Court’s mandate remaining unfulfilled. This could for instance occur where the Court legitimises certain institutional practices of member states, however discriminatory they may be. In such cases, where there is an apparent bias in favour of a government, the perception that justice is not being served will prevail, thereby rendering the Court a political tool of African governments.

This apparently extreme view has its roots in the history of the African Commission where the rule of politics rather than law prevailed. There was a ‘deliberate attempt to “maintain an indifferent attitude to the suppression of human rights in a number of independent African states”’. In addition, due mainly to the commission’s lack of powers and the strong political influence wielded by the Assembly (of the Organisation of African Unity) through the procedure of appointing the members of the commission, the latter has proved inadequate in ensuring the protection of human rights in Africa. Perhaps a more compelling reason for assessing the Protocol and the African Union with a degree of caution is that ‘the OAU has historically been led by heads of state who themselves have been responsible for massive human rights abuses. Interstate condemnation of human rights violations is not likely in such a context’. The result of this state of affairs was that the OAU became a ‘mutual admiration club’. More to the point with regard to the African Commission is that it ‘lacks the institutional independence to be effective as a regional human rights institution’. The fact that some of the serving commissioners retained their high positions in government created a possible ‘conflict of interest in their ability to function as independent experts’.

Under article 13 of the Protocol, it is the state parties that shall nominate prospective judges of the Court. The actual selection process is left in the hands of the political heads of state (article 14). It is submitted that such an arrangement allows for political appointments to the bench, thus perpetuating the cycle of political interference experienced by the African Commission.
Moreover, any apparent leniency by the Court towards governments may be an additional contributing factor to the failure of the Court to meet its mandate, especially in the light of the following:

- Historical violations by states of human rights norms contained in the African Charter and other international human rights instruments
- Ethnic intolerance which has its roots mainly in the drawing of artificial boundaries by previous colonising powers
- Certain principles of international law, such as the doctrine of the margin of appreciation, that seem to allow states to deviate from the proper application of generally accepted human rights norms
- The excessive use of clawback clauses in the African Charter

This article seeks to identify potential obstacles to the effectiveness of the envisaged Court. It will be suggested that an assessment of how some principles of international law should apply in an African context is vital to any attempts at reducing the latitude that African statesmen presently enjoy in subverting human rights standards. It will be suggested further that such an assessment will ultimately facilitate an understanding of the difficulties associated with the development of a continent-wide human rights standard.

Reference will be made to the European human rights system, that is, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), the European Commission on Human Rights (the European Commission) and the European Court on Human Rights (the European Court). As a relatively mature regional human rights mechanism, the European system offers many lessons that ought to be heeded by the Court. Moreover, the influence of the European Convention has also been felt in Africa as it has served to some extent as a model for the African Charter. This is borne out by Osterdahl, who states that the Protocol bears some resemblance to the Statute of the European Court. In addition, 'some African courts ... refer to the [European] Convention when dealing with human rights related issues'. It is submitted that since a number of African states and the drafters of the African Charter have relied on the European Convention, it is appropriate to refer to that system of human rights protection for a more complete understanding of how a regional human rights court should or should not apply the principles of international law mentioned above. If the ultimate goal is to achieve a universal standard of human rights, it is necessary to develop an informed African jurisprudence that is the result of a critical analysis of the failures and achievements of other human rights regional systems such as the European system. It has been pointed out that ‘it is desirable that international judges strive to reach global consensus on the meaning of human rights
and differing cultural values should inform this consensus rather than prevent it through different interpretations of fundamental rights’.24

Accordingly, this article examines the doctrine of the margin of appreciation. The article focuses on the elements of the doctrine, how they are applied in existing regional human rights fora, difficulties associated with it and how they ought or ought not to be applied by the Court, especially in the context of the widespread use of clawback clauses in the African Charter. The article concludes with a suggestion that the limitations and effectiveness of other regional human rights courts must serve as lessons for the Court if the latter is to achieve any shred of credibility.

The analysis is confined to the application of civil and political rights in the African Charter. Third-generation rights and the interpretation of international human rights treaties other than the African Charter raise more unique issues that fall outside the scope of this article. The application of other contexts in which the doctrine may be applicable also falls outside the purview of this article and warrants a separate analysis.

The doctrine of the margin of appreciation

The doctrine of the margin of appreciation holds that, in certain circumstances and at a domestic level, states are allowed a certain degree of discretion in the implementation and application of guaranteed human rights provisions. It is precisely when a state employs the discretion that its conduct is challenged on the ground that it has violated a guaranteed right enshrined in a domestic and/or a regional human rights treaty.

The jurisprudence of the European Court is rich with cases in which the doctrine has been applied. The first such case was that of *Handyside v UK*25 where it was recognised that ‘it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals’ resulting in their respective laws having differing views of ‘the requirements of morals’ (paragraph 48). Since each contracting state has ‘direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them’ (paragraph 49). For these reasons the Court held that ‘[t]he domestic margin of appreciation ... goes hand in hand with a European supervision’ (paragraph 49).

A regional human rights court is therefore tasked with, inter alia, ensuring the observance of member states’ engagements (paragraph 49). The doctrine requires that when doing so, the regional court must ‘take into account the legal and factual situations in the State, with the result that the standards of protection may vary in time and place’.26
Over a period of time, a rule of thumb developed by the European Court is that ‘where there is substantial consensus in the domestic practice and laws of states in relation to a particular right, then states have a small margin of appreciation, but ... where there is no such consensus the margin of appreciation is larger’. After the Handyside case, the idea that governments should be accorded a margin of appreciation became firmly established in the jurisprudence of the European Court with regard to restrictions on the freedom of expression, limits on the right to privacy, controls of property use and, in the recent case of Cha’are Shalom ve Tsedek v France, restrictions on the freedom of religion. The European Court is likely to allow an interference with or restriction of European Convention rights where a respondent government can show that the interference was justified by a legitimate aim and proportional to the need at hand, that is ‘necessary in a democratic society’.

The doctrine is, however, not without difficulties. In its recognition of moral relativism, the doctrine is incompatible with the notion of the universality of human rights. This leads ‘national institutions to resist external review altogether, claiming that they are the better judges of their particular domestic constraints and hence the final arbiters of their appropriate margins’. Clearly, a regional court that grants states too much latitude in the application of regional human rights provisions encourages such an attitude.

Marks has criticised the manner in which the doctrine has been applied on the basis that the European Convention organs have been more partial to arguments by governments that a restriction on free speech is justified when it is based on grounds of national security than ‘when the judiciary’s authority is at stake’. Marks’ argument seems to suggest that the European Court, in the exercise of its subsidiary power of review over certain defined issues, will more readily grant a respondent government a wider margin of appreciation instead of examining the factual circumstances and consensus standard to determine how wide a margin, if any, should be accorded to that government.

An additional difficulty with the doctrine is the tendency of the European Court and Commission to simply accept a government’s claim that, for instance, an emergency existed at the time it failed to apply the right in question. It is submitted that the better view, as expressed by the International Law Commission, is that a regional human rights court or commission ‘should make their own “objective determination” of whether an emergency exists, and, if so, whether the measures adopted were strictly necessary to deal with that emergency’.

Given the cultural, religious, ethnic and political differences at inter- and intra-state levels in Africa, it is likely that the Court will rely heavily on the doctrine to accommodate or even prevent differences of opinion. How the Court does this, will certainly have the effect of either relegating or improving its worth as a credible judicial protector and overseer of human rights law.
Substantial consensus

A particular difficulty associated with the doctrine is the manner in which the European Court and Commission have applied the ‘substantial consensus’ requirement. While this may have some value it is submitted that, in an African context, determining whether there is consensus among member states on a particular issue may be difficult, if not impossible, due to differing conceptions that prevail. In respect of women’s and cultural rights, the practice of female genital mutilation perhaps best illustrates the type of conflicting interests of the individual vis-à-vis the collective that the Court may be required to adjudicate. It is unlikely that the Court will be able to establish any consensus on the issue because female genital mutilation, while practised by a large number of African states (some such states have already enacted legislation prohibiting the practice), is at the same time condemned by many others. One of the criticisms levelled at the substantial consensus requirement is that it ‘unnecessarily subjects the application of the [European] Convention to domestic practice and law’. As was stated above, the difficulty in Africa will be establishing any consensus at all.

MacDonald asserts that the European Court, in requiring substantial consensus, ‘forfeits its aspirational role by tying itself to a crude, positivist conception of “standards” ... and prevents the emergence of a coherent vision of the Court's function’. Benvenisti suggests that the consensus requirement is merely a ‘convenient subterfuge for implementing the court’s hidden principled decisions’ allowing the European Court to ‘eschew its responsibilities’. Requiring a substantial consensus to guide the width of the margin of appreciation detracts from the idea of the universality of human rights and should therefore not apply at all.

Clawback clauses

Clawback clauses constitute restrictions that are built into human rights provisions, most notably in the African Charter. These internal modifiers ‘qualify rights and permit a state to restrict’ those rights ‘to the maximum extent permitted by domestic law’. Article 6 of the African Charter, for instance, provides that ‘[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of this freedom except for reasons and conditions previously laid down by law’ (my emphasis). This provision recognises, in the first sentence, the right to liberty and security, and then proceeds to remove the certainty of the right in the second sentence. Therefore, the individual is given the right and simultaneously deprived of it because it is subject to domestic constraints that often deprive the populace of all legal protection.

Dlamini, among others, has criticised the extensive use of clawback clauses in the African Charter because they limit the impact of the African Charter’s provisions by giving
member states ‘too much autonomy allowing them to violate human rights with impunity’. In his view these clauses allow limitations that are ‘almost totally discretionary’. For these reasons, clawback clauses are a ‘weakness in the African system’.

The difficulty that the Court will face is the determination of how to apply the doctrine when a complainant alleges a violation of an African Charter provision that includes a clawback clause. It is submitted that the first step in considering this question is to identify exactly which provisions of the African Charter contain clawback clauses. These are the provisions that relate to the rights to life (article 4), liberty and security of the person (article 6), the freedoms of conscience, profession and religion (article 8), association (article 10), assembly (article 11), movement and residence (article 12) and the right to participate in government (article 13).

The subjection of the right to participate in government to the provisions of the (domestic) law carries with it the implication that in a one-party state the right is not violated. Furthermore, even military regimes are accommodated by the clawback clause in article 12, because it gives African governments ‘a wide discretion’ to determine what political order they will implement and this easily includes a one-party state.

It is suggested that the Court ought not to apply the doctrine where an applicant alleges a violation of a provision containing a clawback clause. The reason for this is clear: the inclusion of a clawback clause or internal modifier means that the right in question has, from the inception of the African Charter, been automatically subjected to restrictions. To apply the doctrine would be to destroy the right almost completely, a kind of double jeopardy, thereby rendering the provision an empty promise that should not have been included in the African Charter in the first place.

Defining a clawback clause as an internal modifier emphasises the fact that the right in question already suffers from the drawback of being defined, implemented and applied in a manner that may deprive it of any real substance. There may be dire consequences that the dual application of the doctrine and clawback clauses may have for nationals of a state where any form of institutionalised apartheid is practised.

The disadvantages of applying the doctrine in these circumstances are not limited to the immediate impact they may have on individuals. There is a more sinister result: a failure to establish a long-term workable and credible regional human rights regime, leaving Africans with little or no recourse when their rights are violated. Clearly, this would lead to the Court becoming a white elephant, attacked by the very criticisms that have plagued the African Commission.

The Court must avoid the lethargy of the African Commission. A regional human rights court is needed on this continent – now perhaps more than ever before. It would
be disastrous for Africa if the regional human rights system were to enter a state of regression after the adoption of the Protocol, a milestone that recognises the tragedy of failing to provide for a regional judicial human rights body in the African Charter.

**Conclusion**

The Protocol is a giant leap in the right direction for African people who have, to date, suffered first at the hands of colonialists and then at the hands of the ‘leaders’ they had expected to bring them out of the darkness of the past. Reality has proved that in many instances such ‘leaders’ have had no difficulty in subverting the human rights norms of their people. National laws are often used by governments to justify state conduct that detracts from important values such as equality, freedom and dignity that underlie human rights provisions in instruments such as the African Charter. These values are founded on a sense of morality that is aimed at regulating human conduct to ensure respect for the human person.

The adoption of the Protocol is a recognition of the general failure of most African governments to regulate their conduct and hence a failure to respect the people they govern. Now that Africa has taken the initiative to establish the Court, it would indeed be a travesty of justice for the court to fall into the quagmire in which the African Commission found itself. This article has attempted to illustrate the difficulties which the Court will have to face.

The court must take heed of the criticisms that have been levelled against other regional human rights courts and commissions. A failure to do so would result in Africa’s proud achievement, the adoption of the Protocol, becoming an exercise in futility.

There can be no doubt that the Court will need to develop tools of interpretation during the course of its deliberations, especially in the light of the vast differences in ethnic, cultural, religious and political opinion that prevail on a continent dogged by the supremacy of politics over the rule of law.

It is submitted that applying the doctrine of the margin of appreciation may be necessary in certain circumstances. It would be wise for the Court to apply the doctrine in the stricter sense suggested in this article to ensure that the rule of law with its inherent respect for human rights prevails over political Machiavellianism. Allowing states a wide margin of appreciation, especially where clawback clauses are concerned, would be to return Africa to a point where no regional court exists. States would feel free to subvert human rights norms in the knowledge that the Court is a political institution that is more concerned with appeasing governments than achieving its mandate.
Africa has entered a crucial phase in its development, and one that necessitates a new attitude and approach to human rights. However, the Organisation of African Unity and its successor, the African Union, are political organs that seek to establish a judicial organ. Clearly, this marriage of law and politics creates a bleak outlook for the success of the Court. Nevertheless, it is imperative that members of the bench heed the lessons of the European experience if the Court is to serve any real purpose in Africa. While it is unlikely that the Court will be instrumental in developing a minimum and enforceable standard of human rights in Africa, it must at least try to do so for the betterment of the continent as a whole and the people who live on it. It is indeed the success of the Court, however minimal, that will play an important role in the fulfilment, partial or otherwise, of the objectives of the African Union (article 3), and especially those pertaining to:

- The achievement of greater unity and solidarity between African countries and the peoples of Africa (article 3(a))
- The promotion of peace, security and stability on the continent (article 3(f))
- The promotion and protection of human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments (article 3(h))

Notes

4 Preamble of the Protocol.
5 Article 2 of the Protocol.
8 Decision Assembly/AU/Dec.196(XI).
11 The Assembly of Heads of State and Government was established by article VII(1) of the Charter of the Organisation of African Unity, 479 UNTS 39 (entered into force on 13 September 1963). In terms of article VIII, ‘[t]he Assembly shall be the supreme organ of the Organisation’.
During the first ten years of existence of the African Charter, the African Commission gave final decisions on the merits in 12 cases of individual complaints. In all these cases, the governments concerned were found to have violated the African Charter (see F Viljoen, 'Review of the African Commission on Human and Peoples’ Rights 21 October 1986 to 1 January 1997', in C Heyns (ed), Human rights law in Africa 1997, The Hague: Kluwer Law Publishers, 1999, 74.)

The European Commission was created by the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (entered into force on 13 September 1953). The European Commission itself was established in 1954 and was later amended by Protocol 11 which replaced the court and commission system with a court alone.

The European Court was originally the product of the European Convention. The old system was replaced by Protocol 11 ETS 155 signed on 11 May 1994.


Cha’are Shalom ve Tsedek v France (merits), E Ct H R, application 27417/95, Judgment of 27 June 2000.


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Ibid.

Understanding the West African cyber crime process
Andrews Atta-Asamoah

Human securitised reintegration of formerly abducted children in Northern Uganda
Grace Maina
Understanding the West African cyber crime process

Andrews Atta-Asamoah

Introduction

Since the late 1980s, and particularly during the last decade, few mail addresses across the world have been spared the onslaught of unsolicited mail from the West Coast of Africa. In the early days many received such letters by post, later by fax and telex, and in recent times by e-mail. The content of the letters range from business proposals, inheritance reclamation, job offers, announcement of lottery wins, marriage proposals, immigration offers, admission to overseas academic institutions to money transfers and property sales, among others.

This form of crime originated in Nigeria and therefore became known as the ‘Nigerian letter’, but the phenomenon has in recent times assumed remarkable criminal dimensions through which thousands of young people operating from cybercafés in West Africa

Keywords Cyber crime, West Africa, profiling, scouting, harvesting, Internet fraud
siphon millions of dollars from victims across the world each year. In 2008, for instance, about 275,284 complaints with a total loss of US$265 million were received in the United States alone, with victims on average losing about US$931. In addition, the crime rate is estimated to have increased by about 33.1 per cent from the previous year.¹

In a region suffering from serious poverty, with rising youth unemployment rates and endemic corruption, the flamboyant display of wealth by cyber criminals has become a lure to poor and unemployed youth desperate to share in the wealth. As a result, recent trends point to the increasing involvement of young economic and social desperadoes from many countries other than Nigeria. The ‘Nigerian letter’ or ‘419’,² as the crime is known in Nigeria, has become so popular among semi-literate young people that it has seen a rapid regionalisation into a ‘West African letter’. The phenomenon is known by local names such as ‘Sakawa’ or ‘Yahoo-yahoo’ in Ghana³ and ‘Faymania’ in Cameroon.⁴ Apart from regionalisation, the crime has also evolved from the posting of unsolicited letters into a more sophisticated Internet-based criminal activity supported by document falsification, identity theft and money laundering. Further, from a crime perpetrated by disparate individuals in isolated cybercafés, it has metamorphosed into one operated by loosely organised networks who are active across several state boundaries and nationalities.

The association of the crime with West Africa has led to the area acquiring a negative label and being stigmatised internationally as the hub of Internet-based crime, and particularly advance-fee fraud (AFF). The stigmatisation of the region is such that legitimate business propositions originating from West African countries are regarded with suspicion in many international business circles. It has had the further consequence that some of the countries in the region have been blacklisted from online business transactions and payments – a situation which has had a detrimental effect on e-commerce, investor confidence and socio-economic development as a whole.⁵

In recent times, the realisation of the damaging effects of this type of crime on the region has sparked debates in many theatres of national security, commerce and development. In response, some West African countries have started to implement initiatives aimed at curbing the crime, but there is a limited understanding of the scamming process and the modus operandi of the scammers. Accordingly, scamming is continuing to flourish and the number of reported victims continues to rise across the world. It is therefore important to analyse the scamming process since an understanding is essential for formulating appropriate response initiatives.

**Analysis of a typical cyber crime lifecycle**

Many types of cyber crime are perpetrated in West Africa, including advance-fee fraud and black money, contract, credit card, crude oil, immigration/employment/education,
inheritance, Internet dating, lottery, property sale, reshipment, spiritual/religious and transfer of funds scams.

On the basis of their evolution and modus operandi, these crimes can generally be categorised into two principal generations. First-generation cyber crimes generally depend on a target’s willingness to accept an idea proposed by the scammer, thus making a victim’s ‘will’ an essential part of the success of the scam. For this reason many first-
Commentaries

generation scammers claim they are involved in a ‘trade of greed’ and that people who attempt to reap where they have not sown end up as victims. To this category of scammers, the Internet is a marketplace for selling and buying greed. These types of scams, which do not require an exceptional knowledge of computers and the Internet, include advance-fee fraud and black money, contract, credit card, crude oil, gold, inheritance, lottery, reshipment and transfer of funds scams.

Whereas first-generation cyber crimes focus principally on assuming a genuine and authentic tone in order to convince targets, a more complex form of cyber crime has emerged in which cyber criminals focus primarily on assuming the identity of the target. These second-generation types of crimes make extensive use of information technology skills and involve less time for an operation compared to first-generation crimes. It is a purely on-line operation which makes extensive use of phishing, hacking, website cloning and identity theft. Rather than send an e-mail to a target from the scammer’s inbox, as in the case of first-generation crimes, second-generation scammers hack and use the identity of another person (the first target) for the operation. This type of scam therefore involves two victims. By using the identity of a first victim, second-generation scammers usurp and exploit relationships that have been built by their first victim over years to exploit the second.

Though a typical scam process is principally a continuum of activities, a typical scanning process of the two generations can generally be broken down into the three stages depicted in figure 1.

**Stage I Scouting and harvesting**

This first stage of the scam process involves searching for and extracting e-mail addresses and making contact with the targets. West African scammers use various methods to harvest e-mail addresses. Some of them are:

- **Circulation of hoax mails:** Hoax messages are forwarded requesting the reader to forward the message to as many people as possible and to copy the forwarded mail to a given e-mail address. Sometimes the reader is assured that by forwarding the mails their chances of winning a particular price increase. The scammer obtains access to the e-mail addresses of all the people the mail has been forwarded to.

- **Domain contact points:** A domain can usually have up to three contact points. These are the administration, billing and technical contact points. Whichever contacts a domain has, it includes the address of the contact person. Scammers then harvest e-mail addresses from the contact points registry.

- **Forms filled in by users (on-line and on paper):** Sometimes Internet users are requested to fill in online forms, which end up becoming the user’s profile with the company.
involved. Some companies make such information available on their sites as the profile of subscribers, which easily falls prey to spammers, some of whom are scammers. In some cases, the companies involved sell such information to spammers, which may include scammers. Similarly, some companies compile lists of e-mail addresses of participants of events, conventions and sell such e-mail addresses. Generally, however, the average West African scammer harvests addresses from free sources where they are not required to part with money, for example professional directories and conference proceedings.

**Guessing e-mail addresses:** Most e-mail addresses are based on people’s names. Usually the address takes the form of the first letter of the first name and the surname (for example in the case of someone named Alpha Beta, a.beta@domain) or the first and second names combined (alpha.beta@domain). This pattern makes it easy for scammers to guess e-mail addresses. By this harvesting method, a scammer guesses an e-mail address, sends a test mail or actual mail and waits for either an error message or a confirmation.

**Hacking into sites:** Scammers may also hack into sites that supply free e-mail addresses. This method is uncommon, however, since it requires advanced computer skills.

**Online chat rooms:** This is a major source of e-mail addresses for spammers and scammers because some chat rooms easily supply user’s e-mail addresses upon request and also because it is usually one of the first public activities for new Internet users. Many scammers therefore harvest e-mail addresses from chat rooms knowing that they are valid and active addresses.

**Profiles and e-mail addresses posted on web pages:** Some scammers make use of software capable of scanning web pages in search of e-mail addresses.

**Subscriptions to on-line mailing lists:** In search of updates on particular topics, products or events, Internet users sometimes provide their e-mail addresses to websites. In some case such websites are clones and the subscriber is subsequently targeted.

**AOL profiles:** AOL is generally popular among new Internet users with little or no knowledge about the modus operandi of scammers.

**UseNet facilities:** With the aid of software, scammers regularly scan UseNets for addresses. Some of such programmes are capable of recognising and extracting e-mails from articles, especially sections containing the ‘@’ character.

**Web browsers:** This involves the use of websites capable of extracting a surfer’s e-mail address from the browser.
White and yellow pages on the Internet: Certain websites serve as people finders. Such pages contain e-mail addresses from various sources including UseNet. Scammers are able to harvest names and addresses from such pages.

With the increasing advancement in Internet usage and technology across the world, e-mail harvesting has become increasingly easy. The most common approach to harvesting e-mail addresses is through the use of e-mail harvesting tools, the most popular of which is e-mail extractor software. This enables scammers to harvest thousands of e-mails from any of the above sources in a matter of hours.

After harvesting, the scammer makes the first contact with the target by e-mail and waits for a response. Typically many recipients treat unsolicited e-mails as spam and do not respond, although they do not necessarily delete the e-mail from their inboxes. Scammers on average have a less than 2 per cent response rate to the mail they send out.

If a target does respond favourably, scammers proceed to stage II of the scam lifecycle. In cases where scammers are part of a network, the scouting and harvesting process is the responsibility of apprentices and protégés. After a fruitful contact is made by a protégé, the target is passed on to more experienced scammers who assume the identity used by the protégé in the initial contact and communication.

Where hacking and phishing are involved, as is the case in second-generation scamming, this stage involves scouting for a particular e-mail to hack or website to clone in order to assume the identity of the victim during the other stages.

Stage II Relationship building and profiling

In the second stage the scammer will attempt to build a relationship with the target, ranging from friendship and business to social relationships. As the relationship becomes close and deepens through frequent communication, the scammer profiles the target. Scammers usually carry out target profiling by requesting or gathering information about the target’s nationality, profession and age, in the process acquiring a photo, a copy of the information page of a passport/identification document, and sometimes bank account details. This information enables the scammer to determine the ‘juiciness’ of the target. If targets are profiled as ‘dry’, they are discarded from the scamming radar. On the other hand, communication is maintained and strengthened in the case of ‘juicy’ targets and the scammer will proceed to stage III.

Stage II requires great tact and care to avoid the victim from becoming suspicious and therefore cybercrime networks generally use more experienced members for this stage of the scam. This stage could last as long as it takes the scammers to build up a strong relationship from which they are able to profile the target (see ‘target profiling (I)’ in figure 1).
If hackers and website cloners are involved, the relationships built by the first victim are usurped for the exploitation of the second victim.

**Stage III Operational stage**

This is typically the stage during which the scammer proposes an idea involving the transfer of money or goods. Experienced scammers proceed cautiously at this stage since any wrong or suspicious move could strain the relationship and allow the target to escape. As indicated in figure 1, the scammer will propose a new idea if the target is not interested in the first proposal. However, if the target does take the bait, the scammer quickly but cautiously proceeds to ask for the transfer of funds or goods. If the target does transfer the requested funds, the scammer will return to the profiling process (see ‘target profiling (2)’ in figure 1).

At this stage, the scammer seeks to primarily establish whether the victim has the capacity and willingness to pay more. If not, the victim is discarded and the relationship and communication end abruptly. If the likelihood is good, however, the scammer devises a new reason or scheme for obtaining an additional payment or transfer of funds, and so on.

The cycle of money requests and transfers continues until the victim is either unable to transfer additional funds or becomes suspicious. If this happens, the scam cycle is broken. The operational stage can thus last as long as the victim is ready to transfer funds or has not become aware of the scam. In extreme cases a scammer or a network sells the contact details of the victim to another scammer who will start the entire scam process all over again.

**Conclusion and recommendations**

A review of the scamming process provides important insights and entry points for curbing this type of crime. In the first place, it is clear that many Internet users expose themselves to scam e-mails by responding to calls to complete forms, by circulating e-mails, or by subscribing to e-mail alerts from untrustworthy websites, purely as a result of ignorance. Second, with increasing practice, the nature and methods of scamming are rapidly evolving in sophistication. The more sophisticated scammers become, the more difficult it is to curb their activities.

It is important that actions aimed at curbing the crime takes into account five main strands of activity:

**Education**

Internet users, particularly in developed countries, should be educated about the modus operandi of scammers and the dangers associated with visiting sites with malicious
content. This will help reduce the susceptibility of Internet users to harvesting and the likelihood of falling prey to scammers. For instance, they should be taught or learn how to identify scam e-mails and how to avoid being profiled by scammers. Online businesses in particular need to monitor their websites regularly to prevent cloning.

**Web-based snare programmes**

One important deduction from the scamming process is that with an organised technology-based approach, scammers can be trapped. This could be achieved by initiating web-based snare programmes using undercover investigators who will pose as victims. Through undercover operations, ringleaders in the scamming cycles can be busted thereby reducing their activity.

**International cooperation**

However, such web-based snare programmes call for strengthened collaboration and cooperation among security agencies in countries of both the victims and the perpetrators. Given the trans-border nature of the crime, it is also important that Interpol considers giving greater attention to it. International cooperation and the involvement of Interpol will help to bridge the distance between scammers, victims and law enforcers in fighting the crime.

Efforts should also be made to bring on board private enterprises, which are usually key in any scam process. These include money transfer services, banks and Internet service providers and Internet protocol operators.

**Institution of appropriate legal framework**

To provide the framework for collective action, West African countries need to harmonise cyber-related laws with which the crime can be prosecuted in the individual countries and regionally. The responses of countries in the region should be as even as possible in order to curb the redistribution of the menace through the relocation of criminals across borders.

In addition, there is the need for countries in the region to institutionalise the response, as Nigeria has done. This will help prevent ad hoc responses which have the capacity of pushing cyber crime networks underground and making the crime difficult to stem in the long term. As part of institutionalisation, specialised law enforcement units equipped and trained to combat the crime should be formed. It is unthinkable that ill-equipped state institutions will succeed in curbing a modern and technology-based crime such as cyber crime.

Globalisation has propelled cyber space to the fore as one of the frontiers of a state’s territory and a turf where the state needs to assert its territorial integrity. So far,
cyber crime menace has been demonstrating how governless this new frontier on the African continent has become. The earlier efforts are made to contain the menace and assert control in the virtual frontier, the better for the continent and the world at large.

Notes

2 The name ‘419’ was coined from section 419 of the Nigerian Criminal Code, which is the principal legal instrument that criminalises the phenomenon in Nigeria.
Human securitised reintegration of formerly abducted children in Northern Uganda

Grace Maina

Introduction

At the end of every civil conflict the international community, through its agencies and other non-state actors, always provide aid to war-torn countries for reconstructing their communities. This in many cases involves rebuilding infrastructure and restoring the affected communities. One of the most fundamental intervention aspects is a disarmament, demobilisation and reintegration (DDR) programme. DDR resides in the nexus of development and security agendas and has emerged as a critical development tool kit as well as preventive intervention instrument for sustainable peace and has become a core component of peace agreements. Experience has shown that there is a close relationship between the successful DDR of former combatants and the sustainability of

Keywords: reintegration, reinsertion, human security, formerly abducted children
the peacebuilding process. The Brahimi Report referred to DDR as a key ingredient for post-war stability and for reducing the likelihood of recurring conflict. DDR is seen as having the potential to create significant opportunities for sustainable peace and human development.

Despite the growing support for DDR, there is no clear evidence on whether the process works or not. It is imperative to note that while the international community takes credit for the accomplishments of the reintegration process there have been limited studies and little research done about the actual reasons for its success or the criteria for determining what that success really is and how it should be measured. There has also been very little analysis on the utility and efficacy of different reintegration initiatives and whether they have achieved the objective of granting the returning combatants, and particularly child combatants, a civilian lifestyle that is reasonably free from fear and want.

This article focuses only on the reintegration component of DDR with regard to child combatants and analyses the process of reintegration, the gaps in the current reintegration literature and practice, the challenges of the process, and the role played by the various actors in Northern Uganda that enable formerly abducted children to gain a civilian lifestyle. The article draws examples from the DDR experience in Northern Uganda.

**Gaps in the reintegration practice and literature**

The United Nations has defined reintegration as the assistance given to combatants to enable them to re-enter civil society. Reintegration therefore includes economic, political and social aspects. Economic reintegration concerns enabling former combatants to find livelihoods by having access to means of production and employment. Political reintegration refers to the process through which combatants become a part of the civilian decision-making process. Social reintegration refers to the creation of an environment in which the ex-combatants are accepted back into their families and communities. Reintegration should include medium- to long-term programmes that consist of cash compensation as well as training for income-generation opportunities aimed at increasing the potential for economic and social reintegration of ex-combatants and their families.

A conceptual gap in the practice of reintegration concerns the confusion of the term ‘reintegration’ with the concept of ‘reinsertion’. It has often been assumed that merely placing individuals back into their communities constitute reintegration. Different programmes on the ground have marked their success by their successful reunification of the ex-combatants with their families. This action, while it may be a component of reintegration, is not reintegration in itself but rather reinsertion. Reintegration has to do with securing the life of an individual to ensure he is free from fear and free from want.
The reinsertion action on its own does not ensure such freedoms and more needs to be done, apart from the reunification, to ensure effective reintegration. In Uganda the government, in collaboration with the international community, has offered resettlement assistance in the form of material goods and cash so as to facilitate the transition to civility. Although the term ‘reintegration’ has commonly been used to cover all activities after demobilisation, reintegration has in practice often been limited to providing reinsertion and resettlement assistance.\textsuperscript{10} This has been because of a lack of funding, lack of good preparation and the deliberate decision by DDR practitioners to limit their targeted assistance to ex-combatants and failing to include the local communities of reintegration.

Much of the literature on reintegration has also focused on reinsertion activities only. This literature focuses on the activities of the reception centres which are responsible for receiving formerly abducted children on their return from the rebel ranks. These organisations play a fundamental role in tracing the families and communities of such children. The role of the Uganda People’s Defence Forces in rescuing and administering the amnesty certificates has also been widely documented.

Very little research has been done on the activities of these formerly abducted children once they have been reinserted back into their communities. This stage is a significant

\textit{Figure 1 Current occupations of formerly abducted children in Gulu, Northern Uganda}

\begin{figure}[h]
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\includegraphics[width=\textwidth]{figure1.png}
\caption{Current occupations of formerly abducted children in Gulu, Northern Uganda}
\end{figure}

\textit{Source:} Interviews by author
component of the reintegration process, as it is during this phase the formerly abducted children have to adopt civilian roles in the community. Failure to properly articulate this stage and to plan for the complexities around it could in fact result in unsuccessful peacebuilding.

Research carried out in Gulu, a district in Northern Uganda, has shown that once returned to the communities, the majority of returnees engage in small business practices. For example, many of the boda-boda riders in Gulu are former child soldiers. Some of the children are also employed on farms, and in households as domestic workers or in businesses. A large number of returning children also try to obtain further education and training.

The data in the table was obtained from interviews with respondents in Gulu and shows that about 37–40 per cent of the formerly abducted children did return to school or entered an educational institution for some form of training. The organisations and institutions that provide such training therefore form a crucial part of the reintegration process. Their contribution to the process provides a critical basis or starting point for what would be deemed to be successful reintegration. Examples of such organisations in Northern Uganda include Child Voice International (CVI), St Monica’s Tailoring School for Girls and the School for War Affected Children (SOWAC).

**Challenges of reintegration**

To be able to consider the reintegration programme a success, the process must be judged on the extent to which it has reasonably freed formerly abducted children from want and fear and enabled them to survive by securing a livelihood, and to feel safe. To ensure that this is achieved, various challenges have to be addressed.

Many of the reintegration programmes for formerly abducted children have tended to follow a top-down approach, ignoring the input of the local communities. This has also been the case with many of the international organisations and national non-governmental organisations (NGOs), who have implemented programmes which they deemed to be successful without any local input. However, to be successful any reintegration attempt must include the community at grassroots level. The community will help to resolve issues of impunity and its involvement will also help locals to accept the returning children, who in many instances served as combatants, on their own terms and in accordance with the dictates of their culture. A good illustration of local involvement is the involvement of locals in suggesting and offering opinions during the drafting of programmes run and administered by St Monica’s. This is done by means of forums at which the director holds public meetings with members of the community. Discussions and local initiatives in the different reintegration programmes are encouraged. CVI, an
international NGO, also involves the girls they care for in the programmes, in that the girls are asked to define what they perceive success to be.

The ideal objective of reintegrating formerly abducted children is to provide them with a civilian lifestyle that promotes peace. However, the reality is starkly different from what one would envision, for most nations that have been devastated by war simply do not have the resources to provide for proper reintegration. Lack of job opportunities and inadequate rehabilitation facilities for most of these returning children often drive them to resort to crime for their survival. This is why the programming for the reintegration process by the different actors is of vital importance. From observation it was clear that programmes developed with indigenous input took into consideration details that were relevant to the local community. On the one hand are the SOWAC programmes which have been drawn up by government officials in the Ministry of Education. While the majority of its workforce is indigenous and they consulted with the locals, the CVI programmes were drafted by international expatriates based in Gulu. On the other hand, the programmes run in St Monica’s are relevant to the local people and the structure of the institution was greatly informed by the fact that the sisters who run the centre are members of that same community. Furthermore, many of the staff members and instructors have first-hand experience of the devastation of the war – they had also lost relatives, friends and homes – and were therefore committed to restoring their communities. Their personal experiences and knowledge of the economic hardships suffered in the area gave them an advantage in developing a programme that is useful and relevant to the local community and the returning children.

There is a tendency that programmes are aimed at formerly abducted children but do not involve them. A factor that could hinder peace agreements is the way in which combatants view their absorption into the community once a conflict comes to an end.\textsuperscript{15} To ensure successful reintegration it is imperative that one establishes what the demobilised population – in this case formerly abducted children – think of the process. The success of any reintegration effort is tied to whether those being reintegrated view the reintegration process as meaningful.\textsuperscript{16} Their opinions and their interpretations of reality are crucial. However, this will differ from one community to the next and therefore each one must be considered in each programme to ensure successful reintegration. This kind of involvement goes a long way towards ensuring that the returning children reintegrate properly and live peacefully among the rest of the population.

In evaluating reintegration, a basic question that should be asked is whether the activities in reception centres or other aspects have been designed to ensure the freedom of the returnees from want or fear. It is not enough to train these children and give them skills; it is equally important that institutions and organisations take into consideration what comes after that and implement plans to ensure that these children have opportunities within the community. St Monica’s, for example, has put in place a work system in
which they approach potential employers, and it has also established a business tailoring unit in which most of the girls are employed. In contrast, the CVI, while concerned with providing skills and helping the girls recover, did not seem to have planned for the girls for when they left the institution. The ability of a skills or education programme to provide follow-up opportunities after its completion, at least for some of the children, is a prerequisite for ensuring successful reintegration.

There has been a great deal of criticism about the isolation of formerly abducted children with many arguing that there is a need to mix these children with the rest of the community. This is because isolation essentially creates a ‘them’ and ‘us’ mentality. The purpose of reintegration is to place the children back into the community and it therefore defeats the purpose if the formerly reintegrated children are put up on their own and away from the rest of the community. This action perpetuates stigmatisation and could lead to more discrimination, thus complicating the integration of the returning children. One such school is SOWAC, which was built especially for formerly abducted children. Admission to the school is based on the production of an amnesty certificate. The St Monica’s and CVI programmes have attempted to mix the children with those who had not been formerly abducted. Although the people running the programmes understand the harsh experiences that some of the abductees have gone through, they have attempted to provide structures in which all children, abducted or not, can experience childhood. Even though the idea in SOWAC is noble, it might be difficult to reintegrate these children with the community after further alienating them by educating them separately.

A further challenge arises in communities that are so impoverished that it is a struggle for children to attend school, and where preferential treatment of children who had been aggressors in the past over those who had not been in the bush further complicates the dynamics of reintegration. In Gulu, for example, many formerly abducted children use their amnesty certificates to obtain scholarships and grants for businesses, while these services are on the whole not available for children who were not abducted. This obviously creates tension between individuals who were abducted and those who were not. Another challenge when it comes to the reintegration of children arises from mixing boys and girls in the same institution. SOWAC has for example attempted to administer its programmes to a mixed group. However, during the war many of the abducted girls served as wives and were raped by their male counterparts. In this situation the girls always played subordinate roles in comparison to their male counterparts, making it unlikely that placing them in the reintegration programme together with the boys will help them reintegrate into normalcy. As a matter of fact, this action could to some extent be construed to recreating the bush structure in a formalised setting. Furthermore, according to a recent article in a local newspaper, research among these girls has shown that the ex-Lord’s Resistance Army rebels still harass some girls and still consider them to be their wives. An environment where the girls and boys are mixed enhances fear for
some of the returnees and increases the negative power that others have. The high drop-out rate in SOWAC is indicative of a defect in the system structure.

Since a significant number of the female returnees return to their communities with children, reintegration programmes should take this situation into account. Many of the girls who return from the bush are unable to go to school or join any vocation teaching centre because they have to take care of their children. This is an aspect that must be taken into consideration if reintegration is to be considered effective. St Monica’s, for example, has a day-care facility where the girls who are enrolled in their programme can leave their children when they attend school – it has the added benefit that their children also benefit from the basic education they receive there. CVI also makes provision for the children of these girls when planning their programmes. Clearly girls in these programmes feel more socially accepted and this in turn enhances their participation and return to the community.

**Conclusion**

Successful reintegration is the cornerstone of lasting peace. Post-conflict reconstruction efforts must endeavour to ensure that reintegration activities are successful. Governments and the international community must ascertain that those who have returned are equipped with a reasonable chance to live a life that is free from want and fear. To ensure successful reintegration the process must address their needs. The programmes that are created and implemented must be practical and relevant to ensure that they give these formerly abducted children an opportunity to lead normal lives. The organisations must develop programmes that address society’s needs and ensure the relevance of the trades and skills they teach formerly abducted children. Programmes must aim to offer these children a chance at economic independence within the setting of their communities. The programming should be based on holistic principles, by ensuring economic survival, social freedom and political participation, as these are the essential components for not only effective but also useful reintegration programmes.

In addition, the nature and the causes of the conflict must be addressed. Suffice it to say that the conditions in the north of Uganda are harsh, which makes it extremely difficult to implement ideal reintegration programmes. Many members of the communities live in internally displaced persons camps and with very limited resources it is a constant challenge for those who have returned to survive. One would argue that if reintegration implies taking a returning child to an impossible and harsh reality, there is little sense in trying to reintegrate these abductees. Though most of the children were forcibly conscripted into the Lord’s Resistance Army, the harsh realities of reintegrated life could in many instances frustrate their chances of a normal life and force them to turn to crime to survive. The aim of reintegration programmes must therefore be to ensure that
these returning children are established within the confines of what the local community defines as normal life. This implies that programmes must be realistic, accurate and most of all relevant.

The success of reintegration in Northern Uganda does have huge implications for peace in the region. The desire for lasting peace can only be met if there is proper reintegration which deals with human insecurities and if the root causes of the conflict are addressed.

Notes

2 A Ozerdem, Disarmament, demobilisation and reintegration of former combatants in Afghanistan: lessons learned from a cross cultural perspective, Third World Quarterly 23(5), 961–975.
5 M Berdal, Disarmament and demobilisation after civil wars, London: International Institute of Strategic Studies, 1996.
9 N Ball and B van de Goor, Disarmament, demobilization and reintegration: mapping issues, dilemmas and guiding principles, Netherlands Institute of International Relations, ‘Clingendael’ Conflict Research Unit, 2006.
11 The term ‘boda-boda’ refers to motor cyclists who transport members of the public for a fee.
12 CVI is a Christian international organisation that seeks to restore the voices of children silenced by war.
13 St Monica’s Tailoring School for Girls is a centre that was founded in 1975 by the Italian Missionaries Sisters to promote the cause of disadvantaged girls and young women in pursuit of social justice. In recent years the school has been run by indigenous Sisters of the Sacred Heart of Jesus and has worked to provide skills to formerly abducted girls who in most cases are also child mothers.
14 SOWAC is a boarding school facility that was built and funded by the governments of Uganda and Belgium.
16 Ibid, 2.
17 Interview with Norbert Mao, a former Member of Parliament for Gulu, on 27 August 2008.
Basic concepts, issues and strategies of peace and conflict resolution: Nigerian–African conflict case studies
Aja Akpuru-Aja

Intelligence power in peace and war
Michael Herman
Basic concepts, issues and strategies of peace and conflict resolution: Nigerian–African conflict case studies*

Aja Akpuru-Aja

This introductory but important book, Basic concepts, issues and strategies of peace and conflict resolution, written by Aja Akpuru-Aja, a professor of policy, defence and strategic studies at Abia State University, Uturu in Nigeria, seeks to introduce and stimulate research awareness for the exploration of peace and conflict resolution principles.

The book is organised into 12 chapters. The first two chapters provide theoretical perspectives, the first focusing on peace and the second on conflict. The author does an excellent job of covering contending theoretical perspectives on peace and conflict from a multidisciplinary perspective, including philosophical, sociological, political, psychological, environmental and Marxist points of view. These chapters provide a

comprehensive framework for an understanding of the peace and conflict issues that are discussed in the rest of the book.

In chapters 3 and 4 the author reflects on other theoretical ramifications of peace and conflict studies. Specifically, chapter 3 deals with conflict resolution and conflict management mechanisms, most notably the early warning system and peace education, conflict resolution and conflict management assessment frameworks, conflict analysis procedures and conflict reduction policies. Chapter 4 deals with the important subjects of negotiation, mediation and arbitration in the peace and conflict process, underscoring their various typologies, handling styles, factors that may affect the negotiation process such as personality traits and cultural differences, and how to improve negotiation skills.

In view of the prime position accorded peacekeeping in the global search for sustainable international peace and stability, the book devotes a whole chapter (the fifth) to an analysis of peacekeeping in the international system. It traces the history of peacekeeping, examines related concepts of preventative diplomacy, peacemaking, peace enforcement and peacebuilding, explores the changing contexts of peacekeeping across various regions of the world with the emphasis on the United Nations, and post-conflict confidence/peacebuilding, with an emphasis on electoral assistance and mine clearance.

Chapters 6 to 12 provide practical illustrations of the theoretical issues raised in the preceding five chapters within national, sub-regional and regional contexts. Chapters 6 to 8 focus specifically on the Nigerian experience, using as case studies the Ife-Modakeke, Zango-Kataf and Niger Delta crises. These case studies offer a balanced representation of Nigeria’s four geopolitical zones, namely the North, South, West and South-South. Each chapter reflects on the nature, origin, causes, issues, stages, resolution attempts and styles, actors and their roles, and the outcome of the conflict and peace process.

Chapter 9 critically explores peacekeeping operations in Africa in general, focusing on capabilities and culpabilities. Based on the Organisation of African Unity’s interventions in Chad, Rwanda, Burundi and Comoros in the 1980s and 1990s, the chapter reaches the conclusion that despite noticeable contributions in the area of tension reduction, there is a need for a sustainable collective security regime in Africa, especially through the establishment of a standing force. Chapter 10 concerns the peacekeeping initiatives of the Economic Community of West African States Monitoring Group (ECOMOG) of the Economic Community of West African States. It uses insights from the ECOMOG interventions in Liberia and Sierra Leone to analyse the accomplishments, failures, constraints and future challenges of ECOMOG. Chapter 11 examines another sub-regional framework in the African search for an enduring peace and conflict management, the Southern African Development Community (SADC). It reflects on the security framework of SADC, including its capacity-building initiatives, intervention
in the Congo and Lesotho, and a balance sheet of these efforts. The chapter also briefly examines other sub-regional peacekeeping organisations in Africa, notably the Arab Maghreb Union and the East African Cooperation and Economic Community of Central African States, exploring the ups and downs in their attempts at peacekeeping in their respective sub-regions.

The last chapter addresses one of the most vulnerable groups in conflict situations, namely child soldiers, and examines the role of children in armed conflict and conflict resolution in Africa. The chapter focuses on the sources and recruitment of child soldiers, the operational deployment of child soldiers, and the demobilisation and social reintegration of such children. These are all crucial issues in discourses about the child soldier phenomenon, which the book illustrates graphically with several examples.

Overall, the book not only provides a thorough introduction to core conceptual and theoretical issues in peace and conflict studies, but also supports it by means of practical illustrations. Although the book falters in some areas, for example, by failing to show its measurement criteria of African capabilities and culpabilities in peacekeeping and by using outdated data, these are not enough to deny its salient contribution to the topics of peace and conflict resolution. The carefully crafted synergy between the theory and practice of peace and conflict management, the national, sub-regional and regional focus of the book, as well as the simple prose and clarity of expression, makes the book stand out as an impressive academic undertaking. Students, researchers, instructors, policy actors and all others interested in the foundations of comparative African peace and conflict studies from a global perspective will certainly find the book an indispensable companion.

Reviewed by J Shola Omotola, Department of Political Science and Public Administration, Redeemer’s University, Redemption City, Mowe, Ogun State, Nigeria
Intelligence power in peace and war*

Michael Herman

Drawing from his thirty-five years as a professional intelligence practitioner, Michael Herman has produced one of the most definitive texts for intelligence studies. This text makes a remarkable contribution to the emerging field of study on intelligence and presents a case that makes it difficult not to incorporate intelligence studies into the disciplines of war studies, international relations and political science.

This is the first book I have come across that so thoroughly addresses state intelligence capacity as an expression of state power not dissimilar to military power and economic power. The primary preoccupation of the author is how states can utilise this power. The basis of being able to utilise intelligence power in times of war and peace is being

able develop an understanding of the particularities of intelligence and how it relates to the rest of the world.

There is, however, one caveat, which is acknowledged by the author: the book is premised on Western experiences with intelligence and is based on assumptions about relationships between states, intelligence and security as experienced by Western states. This limitation does not detract from the usefulness of the book for an African scholar but rather forces us to question the adoption of assumed relationships from other contexts without examining the ontological underpinnings of such assumptions.

Herman begins by sketching the evolution of the modern intelligence system in a manner that highlights the parallels between the evolution of intelligence and the evolution of warfare. Furthermore, he emphasises that intelligence evolved as part of wider trends in the use of information, both within and outside government. What is interesting is that much of global security discourse today is focused on managing and responding to global change. Reading about the evolution of intelligence brought home the reality that the very development of state security structures has occurred because of global change and the factors which influenced the evolution of intelligence in the past two hundred years are still the same factors that influence it today. These factors are the nature of warfare and information – changes in the nature (and conduct) of war and changes in the manner in which the broader society interacts with information.

The book follows a rather natural logical trajectory from this sound historical basis to address aspects of what intelligence entails in terms of collection and analysis. This section of the book will be of particular interest to intelligence practitioners and presents as an intelligence primer going through the various sources of intelligence such as people (HUMINT), signals (SIGINT) and imagery. The focus is on looking at each individual component before moving into all-source analysis. All-source analysis has become a common feature of modern intelligence systems in both an attempt to improve coordination and quality of outputs and in response to the need for holistic intelligence products which can draw on socio-economic, political and military information.

After describing intelligence processes and institutions, Herman moves onto a discussion of the boundaries of intelligence – asking the question what is and is not intelligence. This discussion is of fundamental importance to African intelligence as the tendency on the continent has been to adopt a very broad view of the role of intelligence. This has been driven by normative developments in the expansion of the security agenda that can, quite conveniently, be used to justify a broader intelligence agenda. The argument can, however, be made that although there are a variety of issues which can legitimately be of interest to intelligence agencies, the use of special powers, especially related to covert collection, need not be employed in all instances. This is also applicable to standards
of secrecy and is reflective of the changed global environment in which it is becoming increasingly difficult to control the flow of information.

The third part of the book examines what intelligence does for governments; in other words, how does intelligence achieve its purpose of affecting decisions. In terms of modern thinking about government, intelligence is posited as an essential component of decision-making – the essence of rational government. Herman details that the relationship between intelligence and decision-making is complex and there are seldom easily observable intelligence–decision linkages. This is an interesting section especially if we apply the same level of thinking to the emphasis on early warning information that is promulgated on the continent. The expectation is that if the information is available then the response is expected, especially in the context of conflict prevention. The author notes, however, that the adsorption of intelligence products is selective and users' preconceptions of and attitudes towards intelligence are critical in how it is taken up. Similar to any other information, Herman concludes that the role of intelligence is a cumulative one in which the aim is to contribute to decision-makers general knowledge thereby reducing the proportion of action based on misconceptions.

In the book, Herman relates the role of intelligence to decision-making in terms of taking national action related to national interest. I believe that similar logic of decision-making processes can be applied to the regional structures in Africa. In dealing with international aspects of intelligence, the author looks at the application of national intelligence for international security utilising intelligence products for activities such as conflict intervention and conflict resolution. Herman then moves on to present the third role of intelligence related to information security, counterespionage and counterintelligence.

This book is so comprehensive that a review of this length cannot do justice to the breadth of issues discussed and the gravity each topic is dealt with. Herman manages to merge theory and practice and create a text which is both easy to read and intellectually engaging. The real value of this text is that it will appeal to and be relevant to a wide range of people from practitioners to academics and civil society advocates. This is largely because of the scope of the work, which touches upon most aspects of the functioning of intelligence. The author purposefully chose not to engage on topics of legislation and oversight which allows for the book to focus not on how to control intelligence but on what it is and how it can best be utilised. This is a strength of the book and is the reason that it is a relevant text for Africa. The challenge that this puts before us is to try to and better understand the ‘what’ and ‘why’ of intelligence to be able to harvest the potential positive influence of intelligence on peace and security in Africa.

Lauren Hutton, Researcher, Security Sector Governance Programme, Institute for Security Studies
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